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No. 91-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

CHARLES M. DOYLE, ET AL.,

Petitioners,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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August 20, 1991

QUESTION PRESENTED

Should a federal circuit court which has exclusive jurisdiction of all appeals by federal employees of suits involving the Fair Labor Standards Act be allowed to declare that there is "no statutory basis for recovery" of liquidated damages under section 216(b) of the Act on the sole ground that it violates the "no interest" rule despite the conceded fact that Congress explicitly provided that federal employees shall have "the right" to bring actions against the United States for "liquidated damages under section 216(b)"?

TABLE OF CONTENTS[1]

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 5

1. Summary 5

2. Procedural and Factual History . . 7

REASONS FOR GRANTING THE WRIT 12

1. This Court should resolve the important issue of whether federal employees have been authorized to

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[1]In compliance with Rule 14.1(b), plaintiffs have lodged with the Clerk of this Court (pursuant to agreement with the Clerk) a computer printing of the list of 4,428 parties (excluding the named plaintiff) to the proceeding in the United States Court of Appeals for the Federal Circuit.

sue for "liquidated damages" to remedy violations of the FLSA-an issue on which the Federal Circuit has exercised its exclusive jurisdiction to deny 2.9 million federal employees a statutory remedy explicitly enacted by Congress. 12

A. Overview 12

B. The Federal Circuit ignored Congress' explicit waiver of immunity for suits seeking liquidated damages. 13

C. The Circuit Court misapplied this Court's decision in *Library of Congress v. Shaw* 15

2. This Court should resolve the circuit conflict over whether Congress' 1974 amendment to section 216(b) of the FLSA empowered employees of "a public agency" to sue their employer for liquidated damages 19

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases:

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 16

Beebe v. United States, 640 F.2d 1283 (Ct. Cl. 1981) 17

Blanton v. City of Murfreesboro, 856 F.2d 731 (6th Cir. 1988) 22

Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1944) 17

Cook v. United States, 855 F.2d 848 (Fed. Cir. 1988) ("*Cook II*") 8, 9

Donovan v. U.S. Postal Service, 530 F.Supp. 894 (D.D.C. 1981) 17

E.E.O.C. v. City of Detroit Health Dept., 920 F.2d 355 (6th Cir. 199) 22

Employees of Department of Public Health & Welfare v. Missouri, 411 U.S. 279 (1973) 19, 20

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 22

Joiner v. City of Macon, 814 F.2d 1537 (11th Cir. 1987) 11, 22

Jones v. Donovan, 25 WH 380 (D.D.C. 1981), *aff'd mem.*, 675 F.2d 1340 (D.C. Cir. 1982) ("*Jones I*") 8

Jones v. Donovan, 26 WH 1602 (D.D.C. 1984) ("*Jones II*") 9

Lanehart v. Marshall, 26 WH 1654 (D.Md. 1984) 9

Library of Congress v. Shaw, 478 U.S. 310 (1986) 13, 15, 18

McMahon v. United States, 342 U.S. 25 (1951) 15

Marshall v. Brunner, 668 F.2d 748 (3rd Cir. 1982) 17

Master v. Maryland Management Co., 493 F.2d 1329 (4th Cir. 1974) 17

McClanahan v. Mathews, 440 F.2d 320 (6th Cir. 1971) 17, 18

Morgado v. Birmingham-Jefferson County Civil Defense Corps, 706 F.2d 1184 (11th Cir. 1983) 22

Overnight Motor Co. v. Missal, 316 U.S. 572 (1941) 16, 17

Pearce v. Wichita Cty., City of Wichita, 590 F.2d 128 (5th Cir. 1979) 22

Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983) 15

Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982) 17, 22

Federal Statutes:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1295(a)(2) and (3) 12

28 U.S.C. § 1346(a)(2) 12, 14

28 U.S.C. § 1491 5

28 U.S.C. § 2516(a) 5

29 U.S.C. § 203(e)(2) 3, 13, 20

29 U.S.C. § 203(x) 4, 13, 20

29 U.S.C. § 204(f) 4, 13, 23

29 U.S.C. § 206(d) 22

29 U.S.C. § 216(b) . . . . . *passim.*

29 U.S.C. § 255 11

29 U.S.C. § 260 . . . . . 3, 6, 7, 15, 16

29 U.S.C. § 626(b) 22

50 U.S.C. app. § 525 9

Miscellaneous:

FPM Letter 551-20 8

H.R. Rep. No. 93-913, 93rd Cong., 2d Sess. 28 (1974) 21

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The opinion of the United States Court of Appeals for the Federal Circuit is reported at 931 F.2d 1546 and reprinted as Appendix A, at page A1. The opinion of the United States Claims Court, from which appeal was taken, is reported at 20 Cl. Ct. 495 and reprinted as Appendix C, at page A14. The opinion of the United States Claims Court denying plaintiffs' motion for reconsideration, which is unreported, is reprinted as Appendix D, at page A40.

JURISDICTION

The opinion of the court of appeals was announced on April 30, 1991. A timely petition for rehearing was denied on May 23, 1991. See Appendix B, at page A12. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the Fair Labor Standards Act of 1938, as amended, are as follows:

> **§ 216. Penalties**
>
> . . .
>
> **(b) Damages; right of action; attorney's fees and costs; termination of right of action**
>
> Any employer who violates the provisions of section 206 or 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or

themselves and other employees similarly situated. . . .

§ 260. Liquidated Damages

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938 as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

§ 203. Definitions

As used in this chapter -

. . .

(e)(2) In the case of an individual employed by a public agency, such term [employee] means -

> (A) any individual employed by the Government of the United States --

(i) as a civilian in the military departments (as defined in section 102 of Title 5),
(ii) in any executive agency (as defined in section 105 of such title). . .

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

§ 204. Administration

. . .

(f) **Employees of Library of Congress; administration of provisions by Office of Personnel Management**

. . .Notwithstanding any other provision of this chapter, or any other law, the Director of the Office of Personnel Management is authorized to administer the provisions of this chapter with respect to any individual employed by the United States. . . . Nothing in this subsection shall be construed to affect the right of an employee to bring an action for unpaid minimum wages, or unpaid overtime

> compensation, and liquidated damages under section 216(b) of this title.

The relevant provisions of the statutes with respect to the jurisdiction and procedure of the United States Claims Court are as follows:

> **28 U.S.C. § 1491.**
>
> The Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, . . .or for liquidated damages in cases not sounding in tort. . .
>
> **28 U.S.C. § 2516.**
>
> (a) Interest on a claim against the United States shall be allowed in a judgment of the United States Claims Court only under a contract or Act of Congress expressly providing for payment thereof.

STATEMENT OF THE CASE

1. Summary

Four thousand four hundred twenty-nine federal employees who are or were police officers and firefighters filed suit under the Fair Labor Standards Act of 1938, as amended ("FLSA"), to seek liquidated damages from their employer, the United States. The federal employees had brought suit because their federal agencies had failed to pay them the proper

amount of overtime compensation when it was due. The employees filed their complaints in the United States Claims Court seeking mandatory and, in the alternative, discretionary liquidated damages as provided for in the FLSA. Earlier, three district courts had awarded discretionary liquidated damages to over 7,000 federal firefighters who had brought identical complaints. The Claims Court held that the statute of limitations had run as to some plaintiffs but that the claims of other plaintiffs were "continuing claims" which arose within the limitations period.

The Claims Court acknowledged that the United States was a defined "public agency" employer covered by the FLSA and that section 216(b) of the Act specified that "**any employer (including a public agency)**" who fails to pay the proper amount of overtime wages when they are earned "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, **and in an additional equal amount as liquidated damages**" (emphasis added). The Claims Court also recognized that section 260 of the Portal-To-Portal Act amended the FLSA and provided that the district court "may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount [of back pay] specified in section 216" where the employer proves: a) good faith, and b) "that he had reasonable grounds for believing that his act or omission was not a violation" of the FLSA.

As to the continuing claims which survived the running of the statute of limitations, the Claims Court held that it was "without authority" to award the liquidated damages which were specifically authorized

by Congress in the FLSA because of the governmental immunity of the United States. (A36-43). In the Claims Court's view, "[t]here may well be other reasons but this court is of the opinion that the most practicable reason for which plaintiffs might be awarded liquidated damages is to make up for the delay in receiving their back pay". (A36-37). Having equated liquidated damages with "delay damages," the Claims Court then equated delay damages with "interest." Thus, the Claims Court held that while plaintiffs strictly had conformed their complaints to the statutory "liquidated damages" remedy afforded by the Act, nonetheless they ran afoul of the "no interest" rule. (A11, 37-38).

The United States Court of Appeals for the Federal Circuit upheld the Claims Court because "[n]either § 216 nor § 260 expressly waives the Government's sovereign immunity against interest. Sections 216 and 260 do not refer to interest. These sections authorize payment of liquidated damages, not interest." (A9). The court found that "[a]lthough the plaintiffs' claims sought 'liquidated damages' in order to fit within the FLSA's terms, the Claims Court found that they actually seek interest or delay damages." (A11). Having recharacterized plaintiffs' statutory claims for liquidated damages as "interest," the court held that "[w]hether labelled liquidated damages for delay, delay damages, or interest, plaintiffs have no statutory basis for recovery." (A11).

2. Procedural and Factual History

In Section 6(c)(3) of the 1974 amendments to the FLSA, Congress ordered the Secretary of Labor to conduct a study of the average amount of weekly

overtime worked by firefighters and by law enforcement officers. Congress specified that the results of that study, when announced by the Secretary of Labor, would establish a new statutory weekly overtime standard. If employees worked per week more than that standard after January 1, 1978, they would be entitled to statutory overtime pay. But, the Secretary excluded the working hours of state and local government employees in conducting the study. Federal civilian firefighters who regularly worked 72 hours per week filed suit to overturn the study and to have it redone. They contended that a new study which would include the working hours of state and local government employees who worked lesser amounts of overtime would result in a lower weekly overtime statutory standard.

In *Jones v. Donovan*, 25 WH 380 (D.D.C. 1981), *aff'd mem.*, 675 F.2d 1340 (D.C. Cir. 1982) ("*Jones I*"), the district court ruled that the Secretary was wrong in excluding the hours worked by state and local employees, and ordered the study redone. The data was recalculated and a lower overtime standard was issued by the Secretary. In FPM Letter 551-20, OPM ordered agencies to pay all firefighters who worked for the federal government two hours of overtime back pay per bi-weekly pay period retroactive to January 1, 1978. OPM similarly ordered that federal employees who were police officers should be paid equivalent amounts of back pay. FPM Letter 551-20 was issued on September 22, 1983. In *Cook v. United States*, 855 F.2d 848 (Fed. Cir. 1988) ("*Cook II*"), the court held that the claims of plaintiffs for back pay and liquidated damages accrued on that date. 855 F.2d at 851.

The United States then paid back pay to all of its civilian firefighters and law enforcement officers retroactively to January 1, 1978. Thereafter, over 7,000 plaintiffs in three cases requested the payment of discretionary liquidated damages to compensate them for the delay they encountered from January 1, 1978 to the date their back pay was actually paid. *See Cook II*, 855 F.2d at 849. Such liquidated damages were awarded to those plaintiffs in *Jones v. Donovan*, 26 WH 1602 (D.D.C. 1984) ("*Jones II*"), *Lanehart v. Marshall*, 26 WH 1654 (D. Md. 1984), and *Cook v. United States*, unreported (D.E.D.N.Y. 1985), aff'd 855 F.2d 848 (Fed. Cir. 1988) ("*Cook II*"). The circuit court remanded the case in *Cook II* to determine if there were any "continuing claims" within a two year statute of limitations.

Petitioners who filed suit in the instant case were not plaintiffs in either *Jones*, *Lanehart*, or *Cook*. They did not receive any liquidated damages although the government paid them their back pay over six years late at the same time as other firefighters and law enforcement officers who were plaintiffs in *Jones*, *Lanehart*, and *Cook*. After the government began paying liquidated damages to *Jones* and *Lanehart* plaintiffs in 1984 and 1985 as a result of the decisions in those cases, many of the petitioners became aware of the liquidated damages remedy and filed suit accordingly.[2] Moreover, a number of federal agencies

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[2]Several of the plaintiffs served on active duty in the military after their overtime wages were paid late and the limitations period as to them must be tolled pursuant to the Soldiers' and Sailors' Civil Relief Act, *as amended*, 50 U.S.C. app. § 525. (A31).

did not adjust their payroll systems until many months or even years after OPM instructed them to apply the new weekly overtime standard immediately, beginning in September, 1983. (A6, 30-31). Apart from the payment of back pay for the period from January 1, 1978 to September 22, 1983, some of the plaintiffs did not begin to receive the correct amount of weekly overtime pay until well after September, 1983, and therefore claimed mandatory liquidated damages of 100 percent equal to the amount of their overtime earned in each such week. These were the "continuing claims" which the circuit court had instructed the trial court to examine on remand in *Cook II*. In the Claims Court below, petitioners sought (1) equitable tolling of the FLSA's two-year statute of limitations for a variety of reasons; (2) discretionary liquidated damages for the delay encountered by them in receiving their overtime back pay for the period from January 1, 1978 to September 22, 1983; and (3) mandatory liquidated damages for those pay periods after September 22, 1983 for which there were "continuing claims".[3]

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[3]Section 260 does not permit the trial court to substitute discretionary liquidated damages (or no damages at all) for the mandatory penalty of § 216(b) equal to the amount of back pay unless the employer can prove, in addition to "good faith", that he had "reasonable grounds for believing that his act or omission" in refusing to pay the correct amount of back pay "was not a violation of the Fair Labor Standards Act of 1938, as amended." 29 U.S.C. § 260. In the instant case, on September 23, 1983, OPM officially instructed all federal agencies as to the correct amount of overtime to be paid henceforth to firefighters and

(continued...)

The basis of federal jurisdiction in the Claims Court was 29 U.S.C. § 216(b). The statutory basis of jurisdiction of the Court of Appeals to hear the appeal was 28 U.S.C. § 1295.

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[3](...continued)
law enforcement personnel. The Claims Court held: "[E]ven after issuance of the OPM directive in September 1983, the Government apparently did not immediately begin making overtime payments." (A6). The government's "good faith" applied for purposes of the "willful" aspects of the length of the statute of limitations (A6) (see 29 U.S.C. § 255), which is an entirely different legal standard than the twin requirements of § 260 with respect to discretionary liquidated damages. In view of the instructions by OPM on September 23, 1983, it is simply inconceivable that any federal agency could prove that it had "reasonable grounds to believe" that its failure to pay the correct amount of overtime **after that date** "was not a violation" of the FLSA. Under similar circumstances, the 11th Circuit held that mandatory (not discretionary) liquidated damages flowed forward from the date that the Secretary of Labor changed its instructions to state and local governments. *Joiner v. City of Moran*, 814 F.2d 1537, 1539 (11th Cir. 1987). In the event this court holds that Congress did explicitly waive immunity for suits for liquidated damages, the case at bar is on all fours with *Joiner* with respect to the "continuing claims".

REASONS FOR GRANTING THE WRIT

1. This Court should resolve the important issue of whether federal employees have been authorized to sue for "liquidated damages" to remedy violations of the FLSA-an issue on which the Federal Circuit has exercised its exclusive jurisdiction to deny 2.9 million federal employees a statutory remedy explicitly enacted by Congress.

A. Overview

The Federal Circuit has exclusive jurisdiction to decide all appeals of federal employees involving compensation disputes with the United States pursuant to 28 U.S.C. § 1346(a)(2), whether they originate in the district courts or in the Claims Court. 28 U.S.C. § 1295(a)(2) and (3). Thus, there can be no conflict between the circuits as to federal employee compensation issues. This Court is presented with the unique responsibility, and opportunity, to correct an egregious error by one circuit court which by virtue of its exclusive jurisdiction has declared that all federal employees may not seek liquidated damages against their employer. All other employees in the public sector who are employed by State and local governments, and all employees in the private sector, have the right to sue for liquidated damages as well as back pay under the FLSA. The right which they assert was created explicitly by Congress in the Act. The impact of the Federal Circuit's decision is to restrict the judicial remedies available to almost 3 million federal employees contrary to the intent of Congress. Despite this pointed and deliberate waiver of immunity by Congress, the Federal Circuit misunderstood and

misapplied this Court's decision in *Library of Congress v. Shaw*, 478 U.S. 310 (1986). The circuit court held that notwithstanding Congress' waiver of immunity to liquidated damages against the United States, such suits were barred nonetheless inasmuch as the "most practicable" purpose of them is to seek damages for delay, which the circuit court equated with "interest." With that analysis, the circuit court rewrote the Act to exclude liability for liquidated damages against the United States.

B. The Federal Circuit ignored Congress' explicit waiver of immunity for suits seeking liquidated damages.

Liquidated damages has been part of the Fair Labor Standards Act since its inception in 1938, and have been available to federal employees since 1974 when the Act was amended to cover employees of the United States. The Federal Circuit's decision seriously diminishes the jurisdiction of the district courts and the Claims Court by declaring for the first time that federal employees "have no statutory basis for recovery" of liquidated damages against the United States. (A11). However, Congress' explicitly waived sovereign immunity as to liquidated damages in the FLSA, 29 U.S.C. §§ 203(e)(2), 203(x), 204(f), and 216(b).

In 29 U.S.C. § 203(x), in 1974 Congress specifically redefined the term "employer" who was covered by the FLSA to include "the Government of the United States." And, in 29 U.S.C. § 203(e)(2), Congress redefined the term "employee" who was entitled to all the remedies afforded by the Act (which included liquidated damages under § 216(b)) to include "any individual employed by the Government of the

United States (i) as a civilian in the military departments. . .[or] (ii) in any executive agency. . . ." In 29 U.S.C. § 204(f), Congress gave the Civil Service Commission (now OPM) the authority "to administer the provisions of this chapter with respect to any individual employed by the United States," and then added: **"Nothing in this subsection shall be construed to affect the right of an employee to bring an action for. . . liquidated damages under section § 216(b) of this title."** In the context of section 204(f), obviously the words "an employee" mean an employee of the federal government. Congress thus deliberately reemphasized that in addition to broadening the definition of an employer to include the United States, federal employees have "the right" to bring an action for "liquidated damages under section 216(b)" of the FLSA against the United States. Finally, in section 216(b) itself, Congress specifically provided that an action **for liquidated damages "may be maintained against any employer (including a public agency). . . ."**

Inasmuch as it is undisputed that the United States is a covered employer and that plaintiffs are covered employees, the Claims Court clearly had jurisdiction of an FLSA action by these plaintiffs for liquidated damages.[4]

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[4]Moreover, section 1491 of Title 28 United States Code states: "The Claims Court shall have jurisdiction to render judgment upon **any claim** against the United States founded either upon the Constitution, or any Act of Congress,. . **.or for liquidated or unliquidated damages** in cases not sounding in tort. . ." (emphasis supplied). *See also* 28 U.S.C. § 1346(a)(2). Congress (continued...)

C. The Circuit Court misapplied this Court's decision in *Library of Congress v. Shaw*

In *Library of Congress v. Shaw*, *Id.*, this Court reinforced the overriding principle that Congressional waivers of immunity are to be strictly construed.

> In analyzing whether Congress has waived the immunity of the United States, we must construe waivers strictly in favor of the sovereign, *see McMahon v. United States*, 342 U.S. 25, 27, 72 S.Ct. 17, 19, 96 L.Ed. 26 (1951), and not enlarge the waiver "'beyond what the language requires'," *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-686, 103 S.Ct. 3274, 3278, 77 L.Ed. 2d 938 (1983), quoting *Eastern Transportation Co. v. United States*, 272 U.S. 675, 686, 47 S.Ct. 289, 291, 71 L.Ed. 472 (1927).

Id., at 318.

While "the no-interest rule provides an added gloss of strictness upon these usual rules," *Id.*, at 318, the circuit court's futile search for an express waiver of "interest" in §§ 216(b) and 260 simply missed the point. Clearly, Congress deliberately waived the immunity of

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[4](...continued)
did not limit its express waiver of sovereign immunity to the award of "liquidated damages" in contract cases but rather extended that remedy against the United States in all "cases not sounding in tort."

the United States to suits for "liquidated damages" pursuant to § 216(b), or for discretionary liquidated damages if the trial court finds the requisite pre-conditions are met under § 260. The critical point of the analysis in *Library of Congress v. Shaw* is not whether the magic word "interest" appears in an authorizing statute, but whether Congress had approved **explicitly** the waiver of immunity to whatever suit was brought. In *Shaw*, the crux of this Court's holding was that the statutory provisions in question there were ambiguous and that there was no legislative history from which to impute a waiver of immunity for "interest". Id., at 319-20. By contrast, in the case at bar, there is no ambiguity in the plain language of the statute. The circuit court could point to no showing that Congress intended to delimit by exceptions the application of liquidated damages against the United States, or that an implied restriction on the availability of liquidated damages against the United States is necessary to avoid serious interference with the functions of governments. "Absent legislative history to the contrary, we must presume that the legislative purpose is expressed by the ordinary meaning of the words used and. that language must be regarded as conclusive." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

Liquidated damages have been an integral part of the Fair Labor Standards Act since its inception in 1938. *Overnight Motor Co. v. Missal*, 316 U.S. 572, 583-84 (1941). This Court declared that by compelling employers to pay a mandatory one hundred percent penalty for failing to compensate their employees with the proper amount of overtime wages, Congress had manifested a strict, but constitutional, policy.

> It constitutes a Congressional recognition that failure to pay the statutory minimum *on time* may be detrimental to maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers and to the free flow of commerce, that double payment must be made *in the event of delay* in order to insure restoration of the worker to that minimum standard of well-being.

Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 (1944).

From the outset, this court and the Congress recognized that liquidated damages -- by their very purpose and nature -- are compensation for delay. Congress fashioned the liquidated damages remedy in section 216(b) as a fixed amount equal to the amount of back pay in order to provide employees with compensatory damages, not punitive in nature, for losses they might suffer for not receiving their statutory overtime wages at the time they are earned, and without the burden of specific proof of actual economic loss. *Overnight Motor Co. v. Missal*, *Id.*; *Marshall v. Brunner*, 668 F.2d 748, 753 (3rd Cir. 1982); *Thompson v. Sawyer*, 678 F.2d 257, 280-81 (D.C. Cir. 1982); *McClanahan v. Mathews*, 440 F.2d 320 (6th Cir. 1971); *Master v. Maryland Management Co.*, 493 F.2d 1329, 1334 (4th Cir. 1974); *Donovan v. U.S. Postal Service*, 530 F.Supp. 894, 901 (D.D.C. 1981); *Beebe v. United States*, 640 F.2d 1283 (Ct. Cl. 1981).

> While wage earners who are being unlawfully deprived of a minimum wage

> are borrowing money to sustain themselves, and paying interest, the non-complying employer, however innocent, is benefitting from his violations, since he has the use of his employee's money. Unless the delinquent employer is required to restore his employee to the position he would have been in had there been no violation, via an award of liquidated damages or interest on the back pay award, the employer will thereby have been unjustly enriched by his own violation at his employee's expense.

McClanahan v. Mathews, 440 F.2d at 326.

Thus, liquidated damages for delay was part of the rule of law for 36 years before Congress explicitly waived the immunity of the United States for such damages in section 216(b) in 1974. In view of the far reaching implications for almost 3 million federal employees to the circuit court's ritualistic formula that liquidated damages are not authorized by § 216(b) unless Congress uses the word "interest," this Court should exercise its authority to clarify *Library of Congress v. Shaw* and instruct the Federal Circuit that a statute's unambiguous words and meaning must be enforced.[5]

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[5]Plainly, § 216(b)'s fixed penalty of 100 percent cannot be regarded as "interest." It is a penalty for delay, but it illustrates that all delay damages are not "interest," while all "interest" constitutes delay damages. If Congress had waived sovereign immunity to suits for

(continued...)

2. This Court should resolve the circuit conflict over whether Congress' 1974 amendment to section 216(b) of the FLSA empowered employees of "a public agency" to sue their employer for liquidated damages

Perhaps the most bewildering aspect of the circuit court's decision is its refusal to consider the legislative history of Congress' 1974 amendment to the FLSA which plainly addressed the issue of waiver of immunity for liquidated damages as well as back pay. The Federal Circuit reliance on the "no interest" rule in this context flatly contradicts holdings in other circuits which awarded liquidated damages to employees of "a public agency" employed by State and local governments.

The history of this legislative waiver of immunity began with the 1966 amendment to section 3(d) of the FLSA to include within the definition of "employer" the employees of any State or its political subdivisions who worked in a hospital, institution, or school. *See Employees of Department of Public Health & Welfare v. Missouri*, 411 U.S. 279, 282-87 (1973). There, this Court held that while the States and their political subdivisions were constitutionally covered by the FLSA "by reason of the literal language" of the amendment, Congress' failure to amend section 216(b) did not waive

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[5](...continued)
"delay damages" instead of "liquidated damages," presumably the circuit court would have reached the same erroneous result because Congress did not use the word "interest".

the sovereign immunity of the States from suit in a federal court. *Id.* What this Court required before concluding that Congress intended to deprive Missouri of her constitutional immunity to be sued *for back pay and liquidated damages* in federal court was for Congress to change "old § 16(b) under which she could not be sued or indicating in some way by clear language that the constitutional immunity was swept away." *Id.*, at 285. This Court took particular note of the FLSA's remedy of liquidated damages:

> In this connection, it is not amiss to note that § 16(b) allows recovery by employees, not only of the amount of unpaid wages, but of an equal amount as liquidated damages and attorneys' fees. It is one thing, as in *Parden*, to make a state employee whole; it is quite another to let him recover double against a State. Recalcitrant private employers may be whipped into line in that manner. But we are reluctant to believe that Congress in pursuit of a harmonious federalism desired to treat the States so harshly.

Id., at 286.

That is precisely what Congress did in 1974. It broadened the definition of "employer" to include employees of "a public agency", which was any individual employed by a State or its political subdivisions (with limited exception). And, for the first time, Congress included within the coverage of the Act employees of "the Government of the United States; . . .any agency of the United States." 29 U.S.C. §§ 203(e)(2) and 203(x). Most significantly Congress

changed "old § 16(b)" to provide the specific waiver of immunity which this Court found absent in *Employees of Dept. of Public Health v. Missouri. Id.*

Section 6(d)(1) of Pub. L. 93-259 amended the second sentence of section 216(b) of the Act to provide as follows: "An action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees similarly situated." As House Report No. 93-913 explained: "Section 16(b) of the Act is amended to make it clear that suits by public employees to recover unpaid wages **and liquidated damages** under such section may be maintained in a Federal or State court of competent jurisdiction. This amendment is intended to overcome that part of the decision of the Supreme Court in *Employees of the Department of Public Health v. Missouri* (93 S.Ct. 1614, April 18, 1973) which stated that Congress had not explicitly provided in enacting the 1966 amendments that newly covered State and local employees could bring an action against their employer in a Federal court under section 16." H.R. Rep. No. 93-913, 93rd Cong., 2d Sess. 28 (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 2811, 2853 (1974) (emphasis supplied).

There can be no mistake whatsoever that the added sentence to § 216(b) explicitly waived the federal government's immunity from suit for liquidated damages. Congress provided in the 1974 amendments that "[a]n action to recover the liability prescribed **in either of the preceding sentences** may be maintained against any employer (including a public agency). . ." (emphasis supplied). The first of "the preceding sentences" in § 216(b) plainly provides that an

employer who fails to pay his employees the proper amount of overtime wages shall be liable in the amount of "their unpaid overtime compensation, . . ., and in an additional equal amount as liquidated damages."

The Federal Circuit is in direct conflict with the District of Columbia Circuit as to the liability of the United States for liquidated damages. *Thompson v. Sawyer*, 678 F.2d 257, 180-82 (D.C. 1982). And, at least three other circuit courts have assessed liquidated damages against local governments based upon the amended § 216(b) under either the FLSA or the Equal Pay Act.[6] *Pearce v. Wichita Cty., City of Wichita*, 590 F.2d 128, 134 (5th Cir. 1979); *E.E.O.C. v. City of Detroit Health Dept.*, 920 F.2d 355 (6th Cir. 1990); *cf. Blanton v. City of Murfreesboro*, 856 F.2d 731, 737 (6th Cir. 1988); *Joiner v. City of Macon*, 814 F.2d 1537 (11th Cir. 1987); *Morgado v. Birmingham-Jefferson County Civil Defense Corps*, 706 F.2d 1184, 1189 (11th Cir. 1983), *cert. denied*, 464 U.S. 1045 (1984).

Thus, the Federal Circuit's aberrant reading of § 216(b) is in direct conflict with at least four other circuits. Inasmuch as all federal employees must channel their FLSA cases to the Federal Circuit, its

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[6]Employers who violate the Equal Pay Act (29 U.S.C. § 206(d) (1976)) are subject to the remedies contained in its parent statute, the FLSA. 29 U.S.C. § 206(d)(3). The circuit courts must interpret the scope of the 1974 amendments as it pertains to the liability of a "public agency" for liquidated damages under the Equal Pay Act. And, see 29 U.S.C. § 626(b) with respect to the Age Discrimination Act.

refusal to apply Congress' clear intent has a disparate impact upon those 2.9 million employees wherever they reside. Moreover, the conflict between the circuit courts as to the effect of Congress' 1974 amendment will be exacerbated as more circuit courts review liquidated damages assessed against state and local governments under the Equal Pay Act as well as under the FLSA in the aftermath of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

It is judicial activism at the extreme for the Federal Circuit to flout the rule of law as enacted by Congress in §§ 204(f) and 216(b). This Court should exercise its supervisory power to bring the Federal Circuit into line with the other circuits by ruling that the analysis of the court of appeals in the case at bar is patently inconsistent with the statute.

CONCLUSION

For the reasons stated above, a writ of certiorari should be granted.

Respectfully submitted,

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August 20, 1991

APPENDIX

TABLE OF CONTENTS

Page

APPENDIX A
Opinion of the United States Court of Appeals for the Federal Circuit affirming the decision of the Claims Court, dated April 30, 1991 . . . . . A1

APPENDIX B
Opinion of the United States Court of Appeals for the Federal Circuit denying appellants' petition for rehearing, dated May 23, 1991 . . . . . A12

APPENDIX C
Opinion of the United States Claims Court granting defendant's motion for summary judgment, dated May 25, 1990 . . . . A14

APPENDIX D
Opinion of the United States Claims Court denying plaintiffs' motion for reconsideration, dated June 20, 1990 . . . . . A41

APPENDIX A

United States Court of Appeals for
the Federal Circuit

90-5148

CHARLES M. DOYLE and 4,428
other named plaintiffs,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: April 30, 1991

Before MARKEY, MICHEL, and RADER,
Circuit Judges.

RADER, Circuit Judge.

This case is a consolidation of several cases against the Government brought by Mr. Charles M. Doyle and other federal civilian firefighters and law enforcement personnel. The federal personnel sought liquidated damages as compensation for the Government's delays in paying overtime. The United States Claims Court refused to toll the two-year statute

of limitations and dismissed these suits. *Doyle v. United States*, 20 Cl. Ct. 495 (1990). This court affirms.

BACKGROUND

The Claims Court set forth in detail the facts and relevance of related cases. *Doyle*, 20 Cl. Ct. at 497-98. This opinion therefore provides a summary.

The 1974 Fair Labor Standards Act amendments (1974 amendments) granted federal firefighters and law enforcement officers overtime pay. Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-19, as amended in 1974, Pub. L. No. 93-259 § 6(c)(1)(A), 88 Stat. 55. The overtime pay applied to hours worked after January 1, 1978 which exceeded either 216 hours in a 28-day period or "the average number of hours" worked in similar periods in 1975. 29 U.S.C § 207(k)(1) (1988). The 1974 amendments required the Secretary of Labor (Secretary) to conduct a study to determine the average hours in 1975. The Secretary's study, however, disregarded hours worked by state and local personnel, compiling the average solely on the basis of hours worked by federal employees. This study set the 1975 average at 216 hours for firefighters and 186 hours for law enforcement personnel.

Federal employees challenged the study. *Jones v. Donovan*, 25 Wage & Hour Cas. (BNA) 380 (D.D.C. 1981), *aff'd. mem.*, 675 F.2d 1340 (D.C. Cir. 1982) (*Jones I*). The district court ordered the Secretary to recompute the overtime standards including state and local data. The Secretary's revised study reduced the average hours to 212 and 171 respectively.

Based on the new study, the Office of Personnel Management (OPM) ordered federal agencies to award their personnel overtime back pay. Federal Personnel Manual (FPM) Letter 551-20, September 22, 1983. In late 1983, the Government began to make lump sum payments for overtime, retroactive to January 1978. These payments did not include interest. At this point, many federal employees filed suits seeking liquidated damages for the Government's delay in making the required payments. *See, e.g., Jones v. Donovan*, 26 Wage & Hour Cas. (BNA) 1602 (D.D.C. 1984) (*Jones II*); *Lanehart v. Marshall*, 26 Wage & Hour Cas. (BNA) 1654 (D. Md. 1984).

Seven firefighters filed such a suit in the Eastern District of New York. *Cook v. United States*, No. CV85-1467 (E.D.N.Y. Dec. 23, 1985). The district court awarded liquidated damages, tolled the two-year statute of limitations, and ordered the Government to produce the names of employees to whom it had paid overtime. On appeal, this court affirmed the district court's order compelling the production of names, but remanded the case for consideration of the tolling question. *United States v. Cook*, 795 F.2d 987 (Fed. Cir. 1986) (*Cook I*).

On remand, the district court granted summary judgment for plaintiffs. The court decided that plaintiffs' claims accrued when OPM published the results of the Secretary's new study in September 1983. The trial court further determined that the Government willfully refused to pay overtime, thus invoking the three-year statute of limitations of 29 U.S.C. § 255(a)

(1988).[1] *United States v. Cook*, unreported (E.D.N.Y. 1985).

When the case returned on appeal, this court upheld the district court's accrual date, but reversed its determination that the Government's actions were willful. *United States v. Cook*, 855 F.2d 848 (Fed. Cir. 1988) (*Cook II*). Thus, section 255(a)'s two-year statute of limitations applied to the *Cook II* plaintiffs. This court remanded for computation of damages and for consideration of the tolling of the statute. The district court transferred the remaining claims to the Claims Court. *Cook v. United States*, No. CV85-1467

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[1]Section 255 states:

> Any action commenced on or after May 14, 1947, to enforce any cause of action for . . . unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended . . .
>
> > (a) [M]ay be commenced within two years after the cause of action accrued, and any every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued . . . .

(E.D.N.Y. June 12, 1987). The Claims Court consolidated plaintiffs' claims with the claims of Doyle and other workers.

The Claims Court found that plaintiffs in the consolidated cases filed their complaint on November 14, 1985, more than two years but less than three years after the accrual date. This finding required dismissal of the suit as untimely under the two-year statute. The Claims Court granted the Government's cross-motion for summary judgment and dismissed all the complaints. The Claims Court found no basis for tolling the statute of limitations or for awarding liquidated damages. Plaintiffs appealed.

DISCUSSION

Section 1295(a)(3) of Title 28 United States Code gives this court jurisdiction over the Claims Court's grant of summary judgment. This court is not bound by the Claims Court's ruling that no material facts were in dispute. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). Rather, this court reviews the Claims Court's grant of summary judgment *de novo*, construing the facts in this case in a light most favorable to the federal employees. Id. at 1391.

Tolling the Statute of Limitations

The FLSA protects claimants by providing for an automatic one-year extension of the statute of limitations in the case of a willful violation. Furthermore, a trial court must grant the victims of a willful violation liquidated damages. In *Cook II*, this court stated:

> As regards the case of a federal agency that has in good faith accepted and followed the advice of the Secretary of Labor, we think a new *per se* rule is now appropriate; given these facts, that any mistake in responding to the demands of the FLSA is not willful.

Cook II, 855 F.2d at 850 (emphasis added). The Claims Court determined that the Government relied in good faith on the Secretary's overtime rules and did not willfully violate the FLSA. *Doyle*, 20 Cl. Ct. at 499. In the absence of willfulness, the statute of limitations for FLSA violations is two years. 29 U.S.C. § 255(a).

Even after issuance of the OPM directive in September 1983, the Government apparently did not immediately begin making overtime payments. This court in *Cook II* considered post-September 1983 claims. This court's ruling on the Government's good faith applied to those claims as well. The Claims Court correctly rejected the notion that claims arising after the OPM directive are *per se* willful. Instead the Claims Court followed this court's direction:

> With respect to the length of the limitations period, we reverse and remand with directions to ascertain who is now a party, and the damages, if any, to be recovered by any party on the basis that the limitations period is two years, not three, subject to tolling if the court so holds.

Cook II, 855 F.2d at 852.

The Claims Court found that OPM's September 22, 1983 letter notified plaintiffs that the FLSA granted them back overtime pay. From that time, according to the Claims Court, the federal workers "had adequate opportunity to know of their claims against defendants and the opportunity, within a reasonable time, to file such claims." 20 Cl. Ct. at 501. On this basis, among others, the Claims Court denied equitable tolling of the statute of limitations. This court discerns no material issues of fact or errors of law in the Claims Court's actions.

In *Cook I*, this court upheld an order compelling production of the names of potential plaintiffs in overtime back pay cases. The Claims Court found, however, that the OPM directive gave plaintiffs actual notice of entitlement to back pay. *Doyle*, 20 Cl. Ct. at 501. In light of this actual notice, the discovery order sustained in *Cook I* did not change the accrual date for plaintiffs' claims. The Claims Court correctly saw no need to toll the statute of limitations pending production of names.

The trial court's correct decision to apply the two-year statute of limitations renders most of the claims in this case untimely. However, because this court in *Cook II* acknowledged the possible existence of claims continuing beyond the statutory limit, this court also examines the FLSA's statutory remedy.

Liquidated Damages

In *Cook II*, this court recognized that FLSA claims might continue to arise after September 1983.

Cook II, 855 F.2d at 851. This court remanded the case to the district court to determine which "claims, if any, for pay periods, after September 22, 1983, did not accrue until the end of those pay periods." *Id.* The causes of action arising out of this application of the continuing claims doctrine would "not accrue until the end of those pay periods." *Id.* Upon accrual, these claimants might seek liquidated damages under 29 U.S.C. § 216(b) (1988).[2]

For these continuing claims, this court must examine eligibility for liquidated damages. Section 216(b) states that an employer in violation of FLSA obligations "shall be liable" to its employee for liquidated damages in the amount of the unpaid overtime or wages. When an employer violates an FLSA obligation in good faith, however, section 260

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[2]Section 216(b) states:

> Any employer who violates the provision of section 206 or 207 of this title [the minimum wage and maximum hour sections] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

grants a court discretion to award or withhold liquidated damages.[3]

This discretion to award liquidated damages, however, does not extend to a liquidated damages award for interest or delay damages against the United States. *Library of Congress v. Shaw*, 478 U.S. 310 (1986). In *Shaw*, the Supreme Court held that Congress must expressly waive the Government's sovereign immunity from suits for interest payments before claimants can recover interest or delay damages. 478 U.S. at 319. Neither § 216 nor § 260 expressly waives the Government's sovereign immunity against interest. Sections 216 and 260 do not refer to interest. Moreover, Congress specifically codified this principle as part of the Claims Court's procedural mandate. Section 2516(a) of Title 28 U.S.C. states:

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[3]Section 260 states in pertinent part:

> [i]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that this act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

> (a) Interest on a claim against the United States shall be allowed in a judgment of the United States Claims Court only under a contract or Act of Congress expressly providing for payment thereof.

In this case, no contract or Act of Congress expressly provides for recovery of interest.

To the extent plaintiffs seek damages for delay, *Shaw* bars recovery. In *Shaw*, the Supreme Court drew no distinction between interest and delay damages:

> But the force of the no-interest rule cannot be avoided simply be devising a new name for an old institution:
>
> > [T]he character or nature of 'interest' cannot be changed by calling it 'damages,' 'loss,''earned increment,' 'just compensation,' 'discount,' 'offset,' or 'penalty,' or any other term because it is still interest and the no-interest rule applies to it.
> >
> > . . .
>
> Interest and a delay factor share an identical function. They are designed to compensate for the belated receipt of money. The no-interest rule has been applied to prevent parties from holding the United States liable on claims grounded on the belated receipt of funds,

> even when characterized as compensation for delay.

Shaw, 478 U.S. at 321-22 (quoting *United States v. Mescalero Apache Tribe*, 518 F.2d 1309, 1322 (Ct. Cl. 1975), *cert. denied*, 425 U.S. 911 (1976)). Although the plaintiffs' claims sought "liquidated damages" in order to fit within the FLSA's terms, the Claims Court found that they actually seek interest or delay damages. The FLSA does not waive immunity for suits against the Government for interest. Whether labelled liquidated damages for delay, delay damages, or interest, plaintiffs have no statutory basis for recovery.

CONCLUSION

Having correctly detected no material factual disputes, the Claims Court granted summary judgment according to law. The Claims Court's decision is therefore AFFIRMED.

APPENDIX B

United States Court of Appeals for
the Federal Circuit

90-5148

CHARLES M. DOYLE and 4,428
other named plaintiffs,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

ORDER

Before MICHEL, Circuit Judge, RADER, Circuit Judge

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on May 30, 1991.

FOR THE COURT,

Dated: May 23, 1991

Francis X. Gindhart
Clerk

APPENDIX C

IN THE UNITED STATES CLAIMS COURT

No. 669-85C
and Consolidated Cases

(Filed: May 25, 1990)

CHARLES M. DOYLE, *et. al.*, *Plaintiffs*, v. THE UNITED STATES, *Defendant*.	Jurisdiction; Tolling of Statue of Limitations; Fair Labor Standards Act; Revival of Claims; Discretionary Payment of Liquidated Damages; Soldiers and Civil Relief Act.

Ira M. Lechner, Washington, D.C., for plaintiffs.

Mark H. Duesenberg, Washington, D.C., with whom was *Acting Assistant Attorney General Stuart E. Schiffer*, for defendant.

ORDER

TIDWELL, *Judge*:

The case before the court, consolidated with several other cases, is the latest of a series of companion cases brought by federal civilian fire fighters and law enforcement personnel against the government under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219, as *amended in 1974*, Pub. L. No. 93-259 § 6(b)(1)(A), 88 Stat. 55. *See Cook v. United States*, 855 F.2d 848, 849 (Fed. Cir. 1988) (*Cook II*).[1] Plaintiffs were already awarded statutory overtime back pay from January 1, 1978, as a result of the 1974 FLSA amendments, and now seek (1) equitable tolling of the two-year statute of limitations, whereupon jurisdiction lies with this court; and (2) liquidated damages for defendant's delay in making the overtime payments. The parties have submitted cross-motions for summary judgment.

FACTUAL BACKGROUND

The 1974 FLSA amendments provided that federally employed fire fighters and law enforcement personnel were entitled to FLSA overtime payments for hours worked after January 1, 1978 in the excess of the lesser of (1) 216 hours in a twenty-eight day work period, or (2) "the average number of hours (as determined by the Secretary [of Labor] pursuant to [a study mandated by] section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work period of 28 consecutive days in calendar year 1975." 29 U.S.C.

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[1]See the Attachment to this decision for a complete list of the consolidated cases.

§ 207(k). *See United States v. Cook*, 795 F.2d 987 (Fed. Cir. 1986) (*Cook I*). In conducting the study, the Secretary of Labor was partially guided by *National League of Cities v. Usery*, 426 U.S. 833 (1976), which invalidated the 1974 FLSA amendments' inclusion of state and local fire fighters and law enforcement personnel in the overtime hour computation.[2] *Cook I*, 795 F.2d at 989. Consequently, based on the hours worked solely by federal employees, the Secretary established as the number of hours in a twenty-eight day work period above which fire fighters and law enforcement personnel were entitled to FLSA overtime back pay, beginning in 1978, as 216 hours and 186 hours respectively, *Id.*

In *Jones v. Donovan*, 25 Wage & Hour Cas. (BNA) 380 (D.D.C. 1981), *aff'd mem.*, 675 F.2d 1340 (D.C. Cir. 1982) (*Jones I*), and action was brought on behalf of federal employees engaged in fire fighting and law enforcement to challenge the Department of Labor's interpretation of the FLSA provisions governing overtime compensation. The District Court for the District of Columbia ordered the Secretary to recompute the overtime standards by including the state and local data. The court rejected the government's position that the state sovereignty doctrine enunciated in *National League of Cities* required exclusion of data from state and local governments in the development of a report on overtime standards. *Cook I*, 795 F.2d at 989. As a result, the new study reduced the hours over which federal fire fighters and

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[2]*National League of Cities* was overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), on grounds unrelated to the present issues.

law enforcement personnel should have received overtime back pay to 212 and 171 hours respectively. 48 Fed. Reg. 40, 518-19 (1983); *see Cook I*, 795 F.2d at 989. The hourly reduction resulted in a violation of section seven of the FLSA which in turn triggered the remedial measures of section sixteen. 29 U.S.C. §§ 207, 216(b). Accordingly, the Office of Personnel Management (OPM), which is responsible for administering the FLSA in the federal sector, directed that all federal fire fighters and law enforcement personnel, including those not included in the *Jones I* suit, be awarded overtime back pay based on the Secretary's new study. *See Cook* I, 795 F.2d at 989.

Section sixteen of the FLSA, 29 U.S.C. § 216(b), provides that any employer, including any federal agency, which violates the overtime provisions of section seven of the FLSA, 29 U.S.C. § 207, shall be liable to the affected employees in the amount of their unpaid overtime compensation and "in an additional equal amount as liquidated damages." However, the award of liquidated damages is discretionary such that if the employer can establish that the acts giving rise to the FLSA liability were undertaken in "good faith" and it had "reasonable grounds for believing" that its actions were not a violation of the FLSA, the court may decline to award any liquidated damages or it may award any amount that does not exceed the amount specified in section sixteen. *Cook I*, 795 F.2d at 989; *see* 29 U.S.C. § 260. Two district court cases involving fire fighters and law enforcement personnel provide instructive examples of the discretionary nature of the award of liquidated damages under the FLSA. *See Jones v. Donovan*, 26 Wage & Hour Cas. (BNA) 1602 (D.D.C. 1984) (*Jones II*); *Lanehart v. Marshall*, 26 Wage & Hour Cas. (BNA) 1654 (D. Md. 1984).

In *Jones II* and *Lanehart*, the respective district courts found that the government had acted in good faith and had reasonable grounds to believe that hours worked by state and local government personnel need not have been included in the Secretary's study. Notwithstanding this finding, the courts awarded partial liquidated damages equal to the amount of interest due on the plaintiffs' unpaid overtime compensation. The government did not appeal the *Jones II* nor the *Lanehart* decision and, as ordered by the respective courts, paid liquidated damages to plaintiffs in both cases. In addition, the government awarded overtime pay to all similarly entitled employees, whether parties to the district court cases or not, but did not pay liquidated damages to non-plaintiff employees.

After the *Jones II* and *Lanehart* decisions, seven fire fighters who believed they were not plaintiffs in either prior actions filed their own action in the District Court for the Eastern District of New York. *Cook v. United States*, No. CV85-1467 (E.D.N.Y. Dec. 23, 1985). The district court awarded liquidated damages, compelled the government to produce the names and addresses of specific federal fire fighters and law enforcement personnel, and tolled the statute of limitations. That case (*Cook I*) was appealed to the Federal Circuit. 795 F.2d at 987. The Court of Appeals for the Federal Circuit affirmed the district court's order compelling the government to produce the names and addresses of specific fire fighters and law enforcement personnel. *Id.* at 994. In addition, the court of appeals remanded that portion of the order purporting to toll the statute of limitations as prematurely issued. In *Cook v. United States*, 855 F.2d 848, 851 (Fed. Cir. 1988) (*Cook II*), the court of

appeals determined the accrual date of the fire fighters' and law enforcement personnels' claims as September 22, 1983 -- the date OPM published the results of the Secretary of Labor's recomputed study determining hours of work. The court of appeals remanded the case to the district court to compute damages and consider the tolling of the statute of limitations if it appropriately arose. On remand, the district court transferred the claims of the remaining plaintiffs to the United States Claims Court for consolidation with the pending *Doyle* case. *Cook v. United States*, No. CV85-1467 (E.D.N.Y. June 12, 1987).

DISCUSSION

Cross-motions for summary judgment are appropriate when there are no genuine issues of material fact in dispute and one party is entitled to judgment as a matter of law. RUSCC 56(c). In reviewing each motion, a genuine issue of material fact is present if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it would affect the outcome of the suit. *Id.* The present facts are not in dispute. The outcome of the case, therefore, turns on whether one or the other party is entitled to judgment as a matter of law.

The cases before the court represent a consolidation of several companion cases involving the resolution of two issues: (1) whether the court has jurisdiction to hear the case; (2) if the court determines that jurisdiction lies, whether plaintiffs may, should, or should not be awarded liquidated damages under 29 U.S.C. § 216(b).

I. JURISDICTION

A claim accrues when all the events have occurred which fix liability and entitle plaintiffs to institute an action. *Hopland Bank of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988). It is undisputed that *Cook II* established the statute of limitation accrual date of this cause of action as September 22, 1983. Plaintiffs filed their complaint on November 14, 1985, more than two years but less than three years after the accrual date. Under 29 U.S.C. § 255(a), the applicable statute of limitations period is two years except where the violation is "willful" whereupon the cause of action may be commenced within three years after the accrual date.[3] Accordingly, in order for this court to obtain jurisdiction to reach the issue of liquidated damages, it must be shown that either defendant "willfully violated" the FLSA, and thereby invoked the three-year statute of limitations, or that the two-year statute of limitations should be tolled.

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[3]Section 255(a) is technically not part of FLSA but, rather, a part of the Portal-to-Portal Pay Act enacted in 1947. However, the plain language of section 255(a) incorporated it into the FSLA by permitting the filing of "[a]ny action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor and Standards Act of 1938, as amended [29 U.S.C. §§ 201 to- 219]" within specified time limitations. 29 U.S.C. § 255.

A. Willful Violation of the FLSA

In *Cook II*, the Court of Appeals for the Federal Circuit propounded a new standard for determining what constituted "willful;" that standard binds this court. *Cook II* held that for "a federal agency that has in good faith accepted and followed the advice of the Secretary of Labor. . .a new *per se* rule is now appropriate[:]. . .any mistake in responding to the demands of the FLSA is not willful." *Cook II*, 855 F.2d at 850. In the present action, the parties agreed that defendant acted in good faith when it followed the Labor Secretary's overtime requirements which mistakenly excluded state and local fire fighters and law enforcement personnel from the study. Thus, under *Cook II*'s *per se* rule as to a good faith violation of the FLSA, defendant's conduct as a mater of law was not willful and the statute of limitations may not be extended to three years.

B. Tolling of the Statute of Limitations

The remaining alternative for this court to properly obtain jurisdiction and for plaintiffs to recover a liquidated damages award is through tolling of the statute of limitations.

1. Congressional Intent on Tolling

As is evident from *Cook I*, 795 F.2d at 994, tolling is an appropriate means of obtaining jurisdiction. The court maintained in dicta that "[w]hen and if the time comes, the district court will presumably apply the doctrine of equitable tolling consistently with Congress' intent in enacting the particular statutory scheme set forth in [the] FLSA." *Id.* Thus, this court must

consider whether the doctrine of tolling is applicable by this court and if so, consistent with Congress' intent in enacting the statutory scheme of the FLSA.

Plaintiffs attempted to manifest congressional intent with *Bowen v. City of N.Y.*, 476 U.S. 467, 478-80 (1986) (equitable tolling was proper where it was consistent with the statutory scheme and equitable principles to do so), and *Honda v. Clark*, 386 U.S. 484, 501 (1967) (equitable tolling was appropriate where it was "more consistent with the overall congressional purpose" and "nowhere eschewed by Congress"). In *Bowen*, the congressional intent found sufficient to toll the statute of limitations was that "[t]he statute of limitations we construe in this case is contained in a statute that Congress designed to be 'unusually protective' of claimants." *Bowen*, 476 U.S. at 480. Furthermore, the Court was influenced by Congress' authorizing the tolling of the statute in certain cases in consideration of fairness to claimants. *Id.* In *Honda*, depositors holding yen certificates in the Yokohama Specie Bank brought suit to recover those assets of the bank located in the United States that had been seized as enemy property. In 1946 Congress provided in section thirty-four of the Trading with the Enemy Act, 50 U.S.C. app. § 1, for payment from the seized assets to the American citizen or resident creditors of persons whose property was vested. The Supreme Court found that where the public treasury was not directly affected, and the House and Senate Reports indicated a strong moral obligation to satisfy the claims, tolling was proper, as it was nowhere eschewed by Congress. *Honda*, 386 U.S. at 501.

Although both *Bowen* and *Honda* address tolling and the necessity of applying it in accordance with the

underlying legislative intent, neither case provides guidance of specific congressional intent surrounding the FLSA. Plaintiffs here have simply not been able to supply evidence of legislative intent directly on the issue of whether tolling is appropriate under the FLSA. However, plaintiffs did provide evidence of the general congressional intent surrounding the FLSA. For example, it was stated:

> Coverage should be interpreted broadly; and every effort should be made to insure that those employees who have been the victims of violations of this act are made whole.
>
> Improving the Fair Labor Standards Act is a significant achievement only if it is followed by a vigorous enforcement effort designed to bring covered employers into compliance with the new standards as quickly as possible.

120 CONG. REC. S4702 (daily ed. Fed. 28, 1974) (Statement of Sen. Williams). This is supported by a House Report on the 1974 amendment of the FLSA. It was reported that although the FLSA has broad objectives, including breadth of coverage, the present coverage of the act was much more confined, and thus needed to be expanded to fulfill those broad objectives. "The Act declared its purpose in bold and sweeping terms. Breadth of coverage was vital to its mission. Its scope was stated in terms of substantial universality. . . ." H.R. REP. NO. 913, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. CODE & ADMIN. NEWS 2811, 2817 (quoting *Powell v. United States Cartridge Co.*, 339 U.S. 497, 516 (1950)). This history of the FLSA itself

is one of expansion in coverage. H.R. REP. NO. 913, 93rd Cong., 2d Sess., *reprinted* in 1974 U.S. CODE & ADMIN. NEWS 2811, 2814-18.

Although the congressional intent evidences that coverage is to be broad and claimants are to be made whole, it likewise indicates that liquidated damages are not necessary in all cases:

> This measure relieves the employer of being mulcted in damages where he has followed and relied upon a decision of a court of record in a case in which he is a party defendant or if he has obeyed in good faith regulations, orders, rules. . . . It would be unfair to permit liquidated damage against employers who followed the orders and the judgments of the courts and the orders and directives of those who administer the wage-and-hour law, the directives of the President and the other executive agents and departments of the Government.

93 CONG. REC. H1500 (daily ed. Feb. 27, 1947) (Statement of Rep. Robinson). "The purpose of this provision is to protect the employer against the retroactive effect of changes in administrative regulations, etc. . . .Congress has the power to provide protection to employers who have complied in good faith with administrative regulation, interpretation, or enforcement practices." H.R. REP. NO. 71, 80th Cong., 1st Sess., *reprinted in* 1947 U.S. CODE CONGR. SERV. 1029, 1036. From this language it appears that in cases where the government has acted in good faith, as here, Congress did not think liquidated damages

would be necessary. As there is no apparent congressional intent to the contrary, tolling of the statute of limitations would not be necessary. Plaintiffs would not necessarily be any more whole since it is not clear that liquidated damages would be awarded even if the statute were tolled, as the court has discretion to award liquidated damages where there has been good faith on the part of defendant. If on the other hand, defendant's actions could be deemed willful, rendering section 260 inapplicable, tolling would be appropriate. However, in the case of willfulness, Congress eliminated the need for equitable tolling by expressly providing that the statute of limitations is extended to three years. 29 U.S.C. § 255(a). Consequently plaintiffs are adequately protected under the FLSA.

2. Factual Circumstances to Justify Tolling

Even ignoring this conclusion gleaned from legislative intent, the particular facts of this case do not convince the court that tolling is necessary or warranted.

a. Lack of notice. Plaintiffs maintained that the two-year statute of limitations should be equitably tolled primarily because of defendant's alleged failure to provide notice to plaintiffs of the FLSA's applicability to plaintiffs. However, the facts are that defendant effectively actually notified plaintiffs through FPM Letter 551-20 on September 22, 1983 that they were to receive overtime back pay pursuant to the FLSA. By that time, at the latest, plaintiffs were clearly on actual notice of their potential claims and very much in a position to see further recovery as liquidated damages if they so chose to inquire about

their individual claims. The burden of seeking further relief fell on plaintiffs once they received this notice. Defendant was not required to provide further notice to plaintiffs of any future causes of action. This reasoning also negates plaintiffs' argument that the statute of limitations should be tolled during the pendency of the litigation over the production of names and addresses of potential plaintiffs, or until the conclusion of *Cook II* or the District Court's dismissal of *Jones II*.[4] The hard fact is, plaintiffs were already on actual notice of their potential claims despite any alleged improper action or inaction of the government after giving that notice.

b. Insufficient notice. Plaintiffs contended that they did not receive "sufficient notice" because defendant removed the FLSA poster which provided plaintiffs with knowledge of the FLSA's applicability to them. This action by defendant has no bearing on whether defendant provided plaintiffs with sufficient notice. As stated above, plaintiffs had actual notice of their claims through FPM Letter 551-20. On May 16, 1979, OPM rescinded the poster requirement because it was obsolete. OPM's decision to withdraw the requirement for agencies to display the poster was consistent with its authority to administer the FLSA, *see American Fed'n of Gov't Employees, AFL-CIO v.*

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[4]Plaintiffs based this argument, that the statute of limitations should be tolled until the conclusion of *Cook II* or until the district court's dismissal of *Jones II*, on the principle of *Honda v. Clark*, 386 U.S. 484, 501 (1967). However, as discussed above, the Supreme Court in Honda used the specific legislative intent of a statute not applicable to the FLSA.

OPM, 821 F.2d 761, 770 (D.C. Cir. 1987), and did not render the actual notice insufficient.

c. Secretive conduct. In a related issue to plaintiffs' "insufficient notice" argument, plaintiffs contended that defendant's conduct was secretive and prevented plaintiffs from knowing of FLSA violations. However, since both parties agreed that defendant acted in good faith and on reasonable grounds as permitted by the FLSA, this court finds no merit to plaintiffs' contention. Defendant clearly did not, fraudulently or with any deceitful intent, conceal from plaintiffs their rights under the FLSA. Defendant effectively notified plaintiffs through FPM Letter 551-20 that they were to receive overtime back pay pursuant to the FLSA and, in many instances, plaintiffs were invited to submit claims for "Firefighter FLSA Overtime due me." Where a plaintiff has sufficient opportunity to discover the facts, its injury cannot be said to be "inherently unknowable." *McDonald v. United States*, 9 Cl. Ct. 629, 633 (1986). "[T]he law assumes that 'the means of knowledge are the same thing in effect as knowledge itself'. . .thus, only blameless ignorance can suffice to relieve a party from the operation of the statute of limitations." *Mitchell v. United States*, 13 Cl. Ct. 474, 477 (1987) (quoting *Wood v. Carpenter*, 101 U.S. (11 Otto) 135, 143 (1879)): *see also Kay v. Johnson*, 722 F.Supp. 874, 881 (D. Mass. 1989); *Moll v. United States Life Title Ins. Co. of N.Y.*, 700 F. Supp. 1284, 1293 (S.D.N.Y. 1988). For these reasons plaintiffs had adequate opportunity to know of their claims against defendant and the opportunity, within a reasonable time, to file such claims.

The court can find neither need nor reason to justify a tolling of the statute. Accordingly, the statute of limitations will not be tolled.

C. Revival of Statute of Limitations

In addition to their equitable tolling arguments, plaintiffs alleged that despite the initial accrual date, payment of any portion of FLSA back pay revived the entire cause of action for both back pay and liquidated damages so that the date of any later payment of back pay became the new accrual date, as a matter of law, for the remainder of the cause of action for liquidated damages. Defendant refuted this allegation, stating first, that *Cook II* tolled the accrual date to September 22, 1983 and, therefore, there was no legal reason to revive the accrual date when the overtime back pay was paid after that date. Second, defendant stated the 1947 amendments to the FLSA render inapplicable the cases plaintiffs cited in support of the revival doctrine.

The court is not convinced by defendant's first argument. *Cook II* did not toll the statute of limitations. It merely established the initial accrual date as September 22, 1983, the date FPM Letter 551-14 was issued. Until FPM Letter 551-14 was issued, all the events had not occurred that would fix the liability of the government and create a cause of action. *Cook II*, 855 F.2d at 849. Establishing the initial accrual date does not in and of itself invalidate the revival doctrine. The revival doctrine would assume an earlier accrual date and establish it anew at a later point in time, i.e., when partial payment was made.

There is merit to defendant's second argument. The essence of the revival doctrine is that the payment of any amount of debt (back pay in this case) is acknowledgement of the debt, thereby reviving the entire cause of action. Before the 29 U.S.C. § 260 good faith defense, courts were without discretion to waive the imposition of liquidated damages. If plaintiffs were entitled to back pay, plaintiffs would also be entitled to liquidated damages. The liability for back pay and liquidated damages were one, single, indivisible liability and could not be discharged by the payment of part of it. *Hayes v. Cuneo Printing Indus.*, 6 Wage & Hour Cas. (BNA) 344, 346 (N.D. Ill. 1946). Under this reasoning, the payment of back pay would be an acknowledgement of a debt for liquidated damages, as well as for back pay. However, in this case, the section 260 good faith defense does not render the making of back pay an acknowledgement of a debt to pay liquidated damages. Section 260 states that if the court finds there has been good faith, the court does not have to award liquidated damages but may do so at its own discretion. Therefore, by paying back pay, defendant has not acknowledged that it is also required to pay liquidated damages. Defendant is aware that if it acted in good faith it might not be held liable for liquidated damages. 29 U.S.C. § 260.

> The force of an acknowledgement [sufficient to toll the statute of limitations] depends in most states upon the inference to be drawn from it of an intention to pay. If there is anything in the surrounding circumstances, even though not in the words of the acknowledgement, tending to negative such an inference or

> to leave it in doubt, the indebtedness will not be revived.

International Potato Corp. v. United States, 142 Ct. Cl. 604, 608 (1958) (brackets in original and emphasis omitted) (quoting W. JAEGER, WILLISTON ON CONTRACTS § 170 (3d ed. 1957)). In the present case, the section 260 good faith defense operates to negate an inference of acknowledgment of indebtedness. Therefore, in accordance with *International Potato*, the indebtedness will not be revived. When there has been good faith on the part of defendant, the payment of back pay does not in and of itself revive a cause of action for liquidated damages.

D. Continuing Claims Doctrine

Events which take place within the limitations period may establish continuing claims not barred by the statute of limitations. *E.g., Daniels v. United States*, 407 F.2d 1345, 1346 n.1 (Ct. Cl. 1969). Where liability involves the failure to make proper overtime payments, a cause of action accrues as soon as the payor fails to pay what the law requires. *Reebe v. United States*, 640 F.2d 1283, 1293 (Ct. Cl. 1981); *Friedman v. United States*, 310 F.2d 381, 385 (Ct. Cl. 1962), *cert. denied*, 373 U.S. 932 (1963); *see Bevelheimer v. United States*, 4 Cl. Ct. 558, 561 (1984). To simplify, every paycheck after the September 22, 1983 accrual date, when defendant was required to pay overtime but did not, established the accrual of a new cause of action with the concomitant two-year statute of limitations to pursue that claim as well as fresher claims. Consequently, plaintiffs who did not receive FLSA overtime back wages until within two years of the filing

of this case would have a continuing claim for those back wages over which this court may exercise jurisdiction. It is only this defined group of claims, and those defined in section E below, that are not barred by the statute of limitations and to which the liquidated damages section discussed below would apply. This reasoning is in accord with the Federal Circuit's holding in *Cook II*. Although that court set the accrual date as September 22, 1983, the court said the continuing claims doctrine was to be applied to claims for pay periods after September 22, 1983. "The trial court judgment should be modified on the remand to show that claims, if any for pay periods after September 22, 1983, did not accrue until the end of those pay periods. We are not certain there are none." *Cook II*, 885 F.2d at 851.

E. Soldiers' and Sailors' Civil Relief Act

Section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 50 U.S.C. app. § 525, states that the time a litigant serves on active duty in United States military service must be excluded from the statute of limitations period. See, e.g., *Bickford v. United States*, 656 F.2d 636, 639 (Ct. Cl. 1981). For plaintiffs who served on active military duty, the statute of limitations would be two years from the September 22, 1983 accrual date or the subsequent continuing claim pay period date plus the amount of time served in the military on or after September 22, 1983. Accordingly, the liquidated damages section discussed below would apply to those plaintiffs whose time in military service would toll the statute of limitations such that their filing would not be barred.

II. LIQUIDATED DAMAGES

The FLSA, 29 U.S.C. § 216(b), permits an award of liquidated damages from an employer in violation of sections six and seven of the FLSA, 29 U.S.C. §§ 206-207, for unpaid overtime compensation. In the present case, the government violated section seven when it incorrectly relied upon *National League of Cities v. Usery*, 426 U.S. 833 (1976), and excluded hours worked by state and local government employees in the Secretary's study to determine the correct number of hours worked above which federal employees should receive overtime compensation. *Cook I*, 795 F.2d at 989. Defendant contended that because it acted in good faith and on reasonable grounds in its actions pursuant to 29 U.S.C. § 260 of the FLSA, the court should not award liquidated damages to plaintiffs. Section 260's threshold requirements is whether the employer acted in good faith and on reasonable grounds. *Id.* Once this threshold requirement has been attained, whether to award liquidated damages becomes a question for the court's discretion. Thus, a court may choose to deny the award of liquidated damages altogether or grant the award, either partially or fully. *Id.*

Plaintiffs relied on *Jones II* and *Lanehart* as demonstrative that this court should award liquidated damages. In both cases the court awarded partial liquidated damages equal to the amount of interest ostensibly due on good faith and on a reasonable belief that no FLSA provision was violated. The *Jones II* court stated "[t]his approach is consistent with the well established view that liquidated damages under the FLSA are not punitive but rather provide a mechanism for compensating employees for the delay in payment

of overtime wages." *Jones II*, 26 Wage & Hour Cas. (BNA) at 1605 (citations omitted); see, e.g., *McLanahan v. Mathews*, 440 F.2d 320, 326 (6th Cir. 1971). *Jones II* further maintained that awarding liquidated damages was "necessary to compensate plaintiffs for the injury they suffered through loss of the benefit of investing their [overtime] pay at prevailing interest rates." *Jones II*, 26 Wage & Hour Cas. (BNA) at 1605. *Lanehart* concluded "that partial liquidated damages should be awarded in an amount equal to the amount of interest that would have been received on their unpaid overtime compensation." *Lanehart*, 26 Wage & Hour Cas. (BNA) at 1655. Accordingly, plaintiffs in the present action argue that they too are entitled to an award of liquidated damages.

Plaintiffs also attempted to collaterally estop the government from litigating the liquidated damages issue since that issue arguably had been unsuccessfully litigated three separate times prior to the present action, each decision involving the same plaintiffs, and the government failed to appeal any of the district court decisions unfavorable to it. See *Jones II*, 26 Wage & Hour Cas. (BNA) 1602; *Lanehart*, 26 Wage & Hour Cas. (BNA) 1654; Cook II, 855 F.2d 848. Defendant, on the other hand, contended that there is no mutuality of parties in this case and according to the Supreme Court ruling in *United States v. Mendoza*, 464 U.S. 154, 160 (1984), non-mutual offensive

collateral estoppel[5] is inapplicable against the government and, further, *Mendoza* is not limited solely to constitutional issues as plaintiffs maintained. Thus, the court must determine whether *Mendoza* prevents plaintiffs from using non-mutual collateral estoppel against the government.

Plaintiffs argued that *Mendoza*'s requirement of mutuality in cases involving the government was limited to constitutional issues and since no constitutional issues are involved here there was no requirement of mutuality. This construction of *Mendoza* is grounded in the following language:

> [B]ecause the prescriptions of the United States Constitution are so generally directed at governmental action, many constitutional questions can arise only in the context of litigation to which the Government is a party. Because of those facts the Government is more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues.
>
> A rule allowing non-mutual collateral estoppel against the Government in such cases would substantially thwart

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[5]"Offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party." *United States v. Mendoza*, 464 U.S. 154, 159 n. 4 (1984).

> the development of important questions of law by freezing the first final decision rendered on a particular legal issue.

Id. at 160. To construe this language as narrowly as plaintiffs proposed is contrary to the Supreme Court's rationale in *Mendoza*. There the Supreme Court stated that "*Parklane Hosiery's* approval of nonmutual [sic] offensive collateral estoppel is not to be extended to the United States." *Id.* at 158. The Court made no reference to any limitation to particular issues, constitutional or otherwise. *Id.* Moreover, the wording, "in such cases" relied upon by plaintiffs referred to cases already adjudicated against the United States in a prior lawsuit brought by the same or a different party, not to cases involving solely constitutional issues as plaintiffs purported. *Id.* at 158-64. Consequently, because the Supreme Court in *Mendoza* has held that non-mutual collateral estoppel cannot be extended to the government, for collateral estoppel to apply in this case there must be mutuality of parties. *Id.*

Plaintiffs attempted to skirt the mutuality requirement by arguing that they were the same class of plaintiffs as those in *Jones II* and *Lanehart*. However, by definition, plaintiffs here may not be of the same class as in *Jones II* and *Lanehart*. Under the FLSA, "[n]o employee shall be a party plaintiff to [an] action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b). A plaintiff may "opt-in" to become a party to a collective action and thereby elect to be bound by the rulings of the court in that case. However, by "opting-in" a plaintiff does not automatically join every

other collective action involving similar issues.[6] All present plaintiffs were readily identifiable since they had received, or were entitled to receive, overtime back pay compensation. Thus, unless plaintiffs chose to "opt-in" to any of the prior actions, they are not the same class of plaintiffs as those in the *Jones II* and *Lanehart* cases, nor are they bound by the decisions of those courts. Therefore, there is no mutuality of parties in the present case, and hence no collateral estoppel. Notwithstanding this factor, there can be no collateral estoppel in the present case because collateral estoppel is limited to issues of fact and law actually litigated and necessarily determined by the court. In *Jones II* and *Lanehart* the award of liquidated damages fell short of this requirement. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 94 (1980). In *Jones II* and *Lanehart*, the courts' finding that the government had acted in good faith precluded a mandatory award of liquidated damages under 29 U.S.C. § 216(b). Nonetheless, these courts eventually awarded liquidated damages. These awards were specifically based on the exercise of discretion, rather than on findings of fact or law. *Jones II*, 26 Wage & Hour Cas. (BNA) at 1604-05; *Lanehart*, 26 Wage and Hour Cas. (BNA) at 1655. A determination based on the discretion of a United States District Court cannot be said to actually litigate

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[6]The "opt-in" provision of FLSA section 16 should be contrasted with a typical Federal Rule of Civil Procedure 23 class action suit in which the class members, whether aware of the cause of action or not, are bound as plaintiffs upon the filing of the cause of action unless they specifically "opt-out" of the class. FED. R. CIV. P. 23. The opposite is true in the present case.

or necessarily determine issues of fact and law. *See Allen*, 449 U.S. at 94; *Montana v. United States*, 440 U.S. 147, 153 (1979); *McLaughlin v. Bradlee*, 803 F.2d 1197, 1201 (D.C. Cir. 1986). This court may refuse to award liquidated damages or it may award any amount that does not exceed the amount specified in section sixteen if the employer acted in good faith. 29 U.S.C. § 260. It is solely within the court's discretion whether to award liquidated damages and, if so, how much.

There may well be other reasons but this court is of the opinion that the most practicable reason for which plaintiffs might be awarded liquidated damages is to make up for the delay in receiving their back pay. This is reasonable under the discretion which section 260 entrusts to the court and consistent with the awards in *Jones II* and *Lanehart*. Given absolutely no doubt whatsoever of the government's good faith, the court is unable to find any other reason that could possibly justify an award of liquidated damages. Moreover, this is the only basis upon which plaintiffs argue for liquidated damages. However, it is a long-established principle of statutory and federal common law that the government may not pay interest on claims against it unless "Congress has intended to waive the United States' immunity with respect to interest. . .expressly. . . ." *Library of Congress v. Shaw*, 478 U.S. 310, 318-19 (1986); *United States ex rel. Angarica v. Bayard*, 127 U.S. 251, 260 (1888). Such an express waiver must be explicit in its terms:

> [T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the

> intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed.

Shaw, 478 U.S. at 318 (quoting *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 659 (1947); Bayard, 127 U.S. at 260. The Supreme Court further held that compensation for delay is the equivalent of interest.

> But the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution:
>
> > "[T]he character or nature of 'interest' cannot be changed by calling it 'damages,' 'loss,' 'earned increment,' 'just compensation,' 'discount,' 'offset,' or 'penalty,' or any other term, because it is still interest and the no-interest rule applies to it."
>
> . . . .Interest and a delay factor share an identical function. They are designed to compensate for the belated receipt of money. The no-interest rule has been applied to prevent parties from holding the United States liable on claims grounded on the belated receipt of funds, even when characterized as compensation for delay.

Shaw, 478 U.S. at 321-22 (quoting *United States v. Mescalero Apache Tribe*, 518 F.2d 1309, 1322 (Ct. Cl. 1975)). If Congress had intended for the United States to pay interest in back wages or even liquidated damages based upon and specifically or generally equivalent to interest, it could have easily said as much. Therefore, in the absence of an express statutory waiver of the government's immunity with respect to interest, this court finds itself without authority to award liquidated damages as plaintiffs and all others similarly situated might desire.

CONCLUSION

For these reasons, that portion of plaintiffs' motion for summary judgment tolling the statute of limitations is granted insofar as plaintiffs fit within the defined jurisdictional parameters of the continuing claims doctrine or the Soldiers' and Sailors' Civil Relief Act, thereby giving this court jurisdiction over those plaintiffs. Conversely, the court has no jurisdiction over those plaintiffs who do not fit within these parameters. Plaintiffs' motion for summary judgment seeking an award of liquidated damages for those plaintiffs over whom the court has jurisdiction is denied. Defendant's cross-motion for summary judgment is granted. This holding is also applicable to the consolidated cases identified in the Attachment to this Order. The Attachment is an integral part of the Order and is to be published as a part hereof. The Clerk of the court is directed to enter judgment dismissing the complaints accordingly. No costs.

IT IS SO ORDERED.

MOODY R. TIDWELL
Judge

APPENDIX D

IN THE UNITED STATES CLAIMS COURT

No. 669-85C
and Consolidated Cases

(Filed: June 20, 1990)

* * * * * * * * * * * * * * * * * * * *

CHARLES M. DOYLE, *et. al.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

* * * * * * * * * * * * * * * * * * * *

ORDER

The court has reviewed plaintiffs' motion in these consolidated cases seeking reconsideration of the order that denied plaintiff's motion for Summary Judgment and granted defendant's cross motion. Plaintiffs seek reconsideration of the court's decision not to award interest as liquidated damages. Generally, when a party has had a fair opportunity to argue or litigate the issue, motions to reconsider are not favored. *General Electric Co. v. United States*, 189 Ct. Cl. 116, 117-18, 416 F.2d 1320, 1321 (1969).

Further, the Federal Circuit has held that "[t]he decision whether to grant reconsideration lies largely within the discretion of the [trial] court." *Yuba Natural Resources v. United States*, No. 90-345, slip op. at 12 (Fed. Cir. June 6, 1990). Because plaintiffs referred to the legislative history regarding interest and liquidated damages, the court reexamined the question and explained why the ruling was not changed.

The court noted in its May 25, 1990 order that the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b), permits an award of liquidated damages from an employer in violation of sections six and seven for unpaid overtime compensation. Further, the court found that the government violated section seven when it incorrectly calculated the number of hours worked above which federal employees should receive overtime compensation. Defendant contended that because it acted in good faith and on reasonable grounds in its actions pursuant to 29 U.S.C. § 160 of the FLSA, the court should not award liquidated damages to plaintiffs. The court then found that the government acted in good faith and on reasonable grounds in compliance with § 260. Once this threshold requirement had been attained, the award of liquidated damages was a question for the court's discretion.

In the motion to reconsider, plaintiffs agreed that this court may choose to deny or grant the award of liquidated damages altogether. Plaintiffs argue there was no need for an express statutory waiver of the government's immunity with respect to interest because "the only reason for the award of discretionary liquidated damages against the government is to compensate plaintiffs for delay or as the equivalent of interest." Plaintiffs submit that the legislative history

of the 1974 amendments to the Fair Labor Standards Act authorize this court to award interest as liquidated damages.[1] Although this court is vested with wide discretion to award liquidated damages, plaintiffs' reliance on legislative history is misplaced. The Supreme Court has held that "[a]bsent a clearly expressed intention [the language of the statute] must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, (1980). The FLSA, 29 U.S.C. § 260(b), contemplates award of liquidated damages unless the employer demonstrates that it acted on a reasonable belief that there was no violation of the FLSA, and in good faith. This court found that defendant's reliance upon National League of Cities v. Usery, 426 U.S. 833 (1976), was reasonable and in good faith. After finding that defendant acted reasonably and in good faith, the statute provides that "the court may, in its sound discretion, award no liquidated damages or any amount thereof not to exceed the amount specified in section

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[1]Plaintiffs' representation to the court are, in fact, not true. The legislative history as cited by plaintiffs does not refer to the award of interest. The House Report provides that "the Act is amended to make it clear that suits by public employees to recover unpaid wages and liquidated damages. . .may be maintained in a Federal or State court. . . ." H.R. Rep. No. 93-913, 93rd Cong., 2d Sess. 28 (1974), reprinted in 1974 U.S. Code Cong. & Admin. News, 2811, 2853 (1974). The report clearly stated that the amendment was intended to overcome the decision in *Employees of the Department of Public Health v. Missouri*, 411 U.S. 279 (1973), which held that state and local employees could not sue their employer in federal court under FLSA.

216 of this title." 29 U.S.C. § 260 (1988). Section 260 does not refer to interest. Section 216 is also silent as to the award of interest as liquidated damages. The intent of the legislative history cannot be substituted for the plain meaning expressed in the clear language of the statute itself. This court will not supplant congressional intent by substituting its judgment for the plain meaning of the statute. The court has wide latitude in awarding liquidated damages under § 260. This court is not free, however, to re-characterize interest ostensibly due on plaintiffs' unpaid overtime as liquidated damages.

In the prior order this court refused to award interest as liquidated damages because there was "absolutely no doubt whatsoever of the government's good faith," or "any other reason that could possibly justify" such an award. This court has reconsidered plaintiffs' arguments that Congress contemplated the award of interest as liquidated damages and is not persuaded that interest, in the form of liquidated damages -- or otherwise -- is justified in this case.

Thus, after reexamination of the relevant statutes and cases, the court denies plaintiffs' motion seeking reconsideration and award of interest as liquidated damages for those plaintiffs over whom the court has jurisdiction.

IT IS SO ORDERED.

MOODY R. TIDWELL
Judge

(2)

No. 91-295

Supreme Court, U.S.
FILED
OCT 21 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHARLES M. DOYLE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Claims Court may award interest against the United States in exercising its discretion to award "liquidated damages" under the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Blanton v. *City of Murfreesboro*, 856 F.2d 731 (6th Cir. 1988) 15

Brooklyn Savings Bank v. *O'Neil*, 324 U.S. 697 (1945) 10, 11, 12

Cook v. *United States*:

797 F.2d 987 (Fed. Cir. 1986) 4

855 F.2d 848 (Fed. Cir. 1988) 4

EEOC v. *City of Detroit Health Dep't*, 920 F.2d 355 (6th Cir. 1990) 15

Joiner v. *City of Macon*, 814 F.2d 1537 (11th Cir. 1987) 14-15

Jones v. *Donovan*, 25 Wage & Hour Cas. (BNA) 380 (D.D.C. 1981), aff'd mem., 675 F.2d 1340 (D.C. Cir. 1982) 2

Jones v. *Donovan*, 26 Wage & Hour Cas. (BNA) 1602 (D.D.C. 1984) 3

Lanehart v. *Marshall*, 26 Wage & Hour Cas. (BNA) 1654 (D. Md. 1984) 2, 3, 13

Library of Congress v. *Shaw*, 478 U.S. 310 (1986) 6, 7, 8, 9, 11, 12

Missouri v. *Jenkins*, 491 U.S. 274 (1989) 8-9

Morgado v. *Birmingham-Jefferson County Civil Defense Corps*, 706 F.2d 1184 (11th Cir. 1983), cert. denied, 464 U.S. 1045 (1984) 14

Pearce v. *Wichita County*, 590 F.2d 128 (5th Cir. 1979) 14

Rex Trailer Co. v. *United States*, 350 U.S. 148 (1956) 14

Thompson v. *Sawyer*, 678 F.2d 257 (D.C. Cir. 1982) 14-15

Cases—Continued: Page

Tillson v. *United States*, 100 U.S. 43 (1879) 12
United States v. *Cook*, 795 F.2d 987 (Fed. Cir. 1986) 4
United States v. *Mitchell*, 463 U.S. 206 (1983) 9
United States v. *Tillamooks*, 341 U.S. 48 (1951) 12
United States v. *Verdier*, 164 U.S. 213 (1896) 12

Constitution and statutes:

U.S. Const. Art. III 8
Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 2
29 U.S.C. 204(f) 9
29 U.S.C. 216 9
29 U.S.C. 216(b) 3, 6, 7, 9, 10, 12, 14, 15
Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 11
§ 6(a)(2), 88 Stat. 58-59 (29 U.S.C. 203(e)(2)) 9
§ 6(a)(6), 88 Stat. 60 (29 U.S.C. 203(x)) 9
§ 6(c)(1)(A), 88 Stat. 60 (29 U.S.C. 207(k)) 2
Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, Tit. I, § 127(a), 96 Stat. 37 14
28 U.S.C. 1295(a)(2) 14
28 U.S.C. 1346(a)(2) 14
Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84:
29 U.S.C. 255(a) 4
29 U.S.C. 260 (§ 11, 61 Stat. 89) 3, 6, 7, 9, 10, 11, 13, 14
Soldiers' and Sailors' Civil Relief Act, § 205, 50 U.S.C. App. 525 5
Tucker Act, 28 U.S.C. 1491 9
28 U.S.C. 2516(a) 9
42 U.S.C. 2000e-5(k) 12

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-295

CHARLES M. DOYLE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 931 F.2d 1546. The opinion of the United States Claims Court (Pet. App. A14-A40) is reported at 20 Cl. Ct. 495. The order of the Claims Court denying reconsideration (Pet. App. A41-A44) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1991. A petition for rehearing was denied on May 23, 1991. Pet. App. A12-A13. The petition for a writ of certiorari was filed on August 19, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are federal law enforcement personnel and firefighters. They received lump-sum, retroactive payments from the federal government for overtime due under the Fair Labor Standards Act of 1938 (FLSA or Act), 29 U.S.C. 201 *et seq.* They then brought this action to recover liquidated damages under the Act. The Claims Court held that petitioners were not entitled to mandatory liquidated damages, nor were they entitled to a discretionary award of interest on the payments they had received. Pet. App. A14-A40. The court of appeals affirmed. Pet. App. A1-A11.

1. As amended in 1974, the FLSA authorized overtime pay for federally employed law enforcement officials and firefighters, beginning on January 1, 1978. Pub. L. No. 93-259, § 6(c)(1)(A), 88 Stat. 60. Pursuant to the provision in the 1974 amendments for calculating overtime, the Secretary of Labor conducted a study to determine the average number of hours that law enforcement officials and firefighters worked. See 29 U.S.C. 207(k). The Secretary's initial study was successfully challenged in two actions to which petitioners were not parties. *Jones* v. *Donovan*, 25 Wage & Hour Cas. (BNA) 380, 391 (D.D.C. 1981), aff'd mem., 675 F.2d 1340 (D.C. Cir. 1982); *Lanehart* v. *Marshall*, 26 Wage & Hour Cas. (BNA) 1654 (D. Md. 1984). Thereafter, the Secretary performed a new study and published revised overtime standards.

On September 22, 1983, the Office of Personnel Management (OPM) directed federal agencies to use the Secretary's revised standards to calculate overtime due under the 1974 FLSA amendments. In late 1983, various federal agencies began making lump-sum payments, retroactive to January 1, 1978, to

all federal law enforcement officials and firefighters. The payments made pursuant to OPM's directive did not include interest or liquidated damages.[1] Pet. App. A3.

2. Seven firefighters, none of whom were parties to the prior litigation, filed suit in the United States District Court for the Eastern District of New York seeking liquidated damages pursuant to Section 16(b) of the FLSA, 29 U.S.C. 216(b). *Cook* v. *United States*, No. CV85-1467.[2] Pet. App. A3. On appeal of the dis-

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[1] Interest was included in the overtime payments made to the plaintiffs in *Jones* and *Lanehart*. In each case, the district court refused to award plaintiffs mandatory liquidated damages under 29 U.S.C. 216(b), because the government had demonstrated a good faith and reasonable belief that its actions did not violate the FLSA. When an employer establishes good faith and reasonable grounds for its violations, the Act prohibits an award of mandatory liquidated damages under Section 216(b) but permits the court, in its discretion, either to "award no liquidated damages" or to "award any amount thereof not to exceed the amount specified in section 216," 29 U.S.C. 260. The courts in *Jones* and *Lanehart* relied on Section 260 to award interest on the overtime due to the plaintiffs. *Jones* v. *Donovan*, 26 Wage & Hour Cas. (BNA) 1602, 1605 (D.D.C. 1984); *Lanehart*, 26 Wage & Hour Cas. (BNA) at 1655. Neither court discussed whether the federal no-interest rule barred an award of interest, and neither decision was appealed. In the present case, the Claims Court held that the government was not collaterally estopped from relitigating the issue whether interest may be awarded under Section 260. Pet. App. A33-A37. Petitioners did not seek review of that holding in the court of appeals, nor do they raise the issue in this Court.

[2] 29 U.S.C. 216(b) provides in relevant part:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their

trict court's entry of partial summary judgment, the Federal Circuit held that the action was governed by the FLSA's two-year statute of limitations because the Government's actions had not been willful. *Cook* v. *United States*, 855 F.2d 848, 849-850 (Fed. Cir. 1988); see also 29 U.S.C. 255(a) (prescribing three-year limitations period for willful violations and two-year period for all other violations). The court of appeals further held that the limitations period began running on September 22, 1983—the date of OPM's directive—for claims based on pay periods prior to that date. 855 F.2d at 851. The court observed that claims for prior pay periods would be barred with respect to those plaintiffs who joined the action after September 22, 1985, unless it was determined on remand that the statute of limitations should be tolled. *Ibid.*[3] The court determined that the statute of limitations on claims, "if any," for pay periods after September 22, 1983, would commence at the end of the pay periods. *Ibid.* The court remanded the case for a determination of which claims, if any, had been timely asserted. *Id.* at 852.

> unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. * * * An action to recover [liquidated damages] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. * * *

[3] In a prior interlocutory appeal, the court of appeals had upheld a discovery order designed to identify additional potential plaintiffs, many of whom subsequently joined the litigation. See *United States* v. *Cook*, 795 F.2d 987 (Fed. Cir. 1986).

On remand, the district court transferred the claims of the remaining plaintiffs for consolidation with the present action. Ultimately, all of the *Cook* plaintiffs were dismissed from the litigation. Pet. App. A4-A5.

3. Petitioners filed their complaint in the present action on November 14, 1985. Pet. App. A20. On cross-motions for summary judgment, the Claims Court addressed "(1) whether the court ha[d] jurisdiction to hear the case; [and] (2) if [so], * * * whether [petitioners] may, should, or should not be awarded liquidated damages under 29 U.S.C. § 216 (b)." *Id.* at A19.

The Claims Court observed that its jurisdiction was at issue because petitioners brought this action more than two years after September 22, 1983, the date on which the *Cook* court had held the cause of action initially accrued. Pet. App. A20. Relying on *Cook*, the Claims Court held that the FLSA's two-year statute of limitations applied in the present case. *Id.* at A21. The court further held that, assuming that the limitations period was subject to equitable tolling, the facts did not justify tolling in this case. *Id.* at A21-A28. Based on those holdings, the court determined that the only claims, if any, that were not time-barred were (1) claims for pay periods after September 22, 1983, asserted by plaintiffs who joined the suit within two years after the end of those pay periods; and (2) claims as to which the limitations period was tolled under Section 205 of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. 525. Pet. App. A30-A31. The court did not determine which of petitioners' claims, if any, fell into those categories.

The court then held that petitioners were not entitled to liquidated damages under the FLSA. The court initially determined that petitioners could not

recover mandatory liquidated damages under Section 216(b), because the government had established that it had acted in good faith and on a reasonable basis. Pet. App. A32. Nor was a discretionary award of liquidated damages available pursuant to Section 260, the court held. The court noted that the "only basis" on which petitioners sought an award was for the delay in receiving backpay. Pet. App. A37. Petitioners' claims thus implicated the "long-established principle of statutory and federal common law that the government may not pay interest on claims against it unless 'Congress has intended to waive the United States' immunity with respect to interest . . . expressly." *Ibid.* (quoting *Library of Congress* v. *Shaw*, 478 U.S. 310, 318-319 (1986)). The court concluded that, because Congress had not specifically authorized recovery of interest on backpay awards, the court could not award interest in the guise of discretionary "liquidated damages." Pet. App. A38-A39.

4. The court of appeals affirmed. It upheld the Claims Court's determination that the FLSA's two-year limitations period applied and was not subject to equitable tolling. Pet. App. A5-A7. The court of appeals recognized that this holding "render[ed] most of the claims in this case untimely." *Id.* at A7. Nonetheless, because of "the possible existence of claims continuing beyond the statutory limit" (*ibid.*), the court also addressed the availability of liquidated damages.

The court held that the Claims Court's discretion to award liquidated damages under Section 260 of the FLSA "does not extend to a liquidated damages award for interest or delay damages against the United States." Pet. App. A9. The court upheld the Claims Court's determination that, though nominally seeking "liquidated damages," petitioners were "actually

seek[ing] interest or delay damages." *Id.* at A11. The court of appeals observed that under *Library of Congress* v. *Shaw*, *supra*, "Congress must expressly waive the Government's sovereign immunity from suits for interest payments before claimants can recover interest or delay damages." Pet. App. A9. Because "[n]either § 216 nor § 260 expressly waives the Government's sovereign immunity against interest," the court concluded that "*Shaw* bars recovery." *Id.* at A9, A10.

ARGUMENT

Petitioners contend (Pet. 13-18) that the Claims Court may, in exercising its discretion under 29 U.S.C. 260 to award "liquidated damages," award interest against the United States.[4] The court of appeals correctly rejected that contention, and its decision does not conflict with any decisions of this Court or other courts of appeals. Further review is therefore unwarranted.

1. At the outset, we note that in its present posture this case is not suitable for review by this Court. The courts below expressed doubt as to whether any of petitioners' claims were timely, but the courts did not resolve that doubt. As explained above, although the Claims Court "defined" the "groups of claims * * * that are not barred by the statute of limitations" (Pet. App. A31), the court made no findings on which of petitioners' claims, if any, fell into those groups. In the absence of such findings, the court of appeals recognized that there may be no live claims. The court

[4] Petitioners do not seek review in this Court of the court of appeals' holding that the government was not subject to an award of mandatory liquidated damages under 29 U.S.C. 216(b).

of appeals observed that "[t]he trial court's correct decision to apply the two-year statute of limitations renders most of the claims in this case untimely." *Id.* at A7. The court of appeals went on to address the liquidated damages issue based only on "the possible existence of claims continuing beyond the statutory limit." *Ibid.* Thus, the courts below addressed the issue that petitioners seek to present here without resolving the threshold question of whether they had jurisdiction to do so.[5] In light of the unresolved question whether Article III jurisdiction exists, further review is not appropriate.

2. In any event, the court of appeals correctly rejected petitioners' contention that Congress waived the United States' sovereign immunity from interest awards under the FLSA. The court of appeals' decision reflects a straightforward application of the federal "no-interest rule" that this Court applied in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986).

The no-interest rule is itself straightforward: "In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." *Shaw*, 478 U.S. at 314. By requiring that an award of interest be "affirmatively and separately contemplated by Congress" (*id.* at 315), the no-interest rule "provides an added gloss of strictness" on the principle that waivers of sovereign immunity must be "construe[d] * * * strictly in favor of the sovereign" (*id.* at 318) (internal quotation marks omitted). Accord *Missouri* v. *Jenkins*, 491

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[5] Petitioners do not seek review of the court of appeals' holding that their claims are governed by the FSLA's two-year statute of limitations and that the two-year period is not subject to equitable tolling.

U.S. 274, 281 n.3 (1989) (federal no-interest rule is an "ultrastrict rule of construction"). The "broad proscription of interest awards against the United States" (*Missouri* v. *Jenkins*, 491 U.S. at 281 n.3) recognizes that "[w]hen Congress has intended to waive the United States' immunity with respect to interest, it has done so expressly," *Shaw*, 478 U.S. at 318; see also *id.* at 318 n.6 (citing statutes expressly providing for awards of interest).[6]

The court of appeals correctly applied the no-interest rule to conclude that "[t]he FLSA does not waive immunity for suits against the Government for interest." Pet. App. A11. As the court of appeals recognized, neither of the two provisions governing recovery of backpay under the FLSA refers to interest. *Id.* at A9. Sections 216 and 260 of Title 29 refer only to awards of liquidated damages, not awards of interest.[7] As the Claims Court recognized,

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[6] The no-interest rule applies by statute to actions brought in the Claims Court. 28 U.S.C. 2516(a); see also *Shaw*, 478 U.S. at 317. While the Tucker Act, 28 U.S.C. 1491, grants the Claims Court jurisdiction to entertain claims for liquidated damages, the Act "does not create any substantive right enforceable against the United States for money damages." *United States* v. *Mitchell*, 463 U.S. 206, 216 (1983) (internal quotation marks omitted). Thus, the Tucker Act does not waive the United States' immunity from awards of interest.

[7] Petitioners cite (Pet. 13-14) several provisions in addition to Sections 216 and 260, none of which are relevant to the question presented here. Sections 203(e)(2) and 203(x) of Title 29 simply provide that governmental employees and employers, respectively, are covered under the FLSA. Sections 204(f) refers to the right of federal employees to bring actions for liquidated damages under Section 216(b). There is no dispute that, as federal employees, peti-

"[t]here may well be other reasons" that would justify a discretionary award of liquidated damages under Section 260, but in light of the no-interest rule a discretionary award may not be based on a claim for interest. *Id.* at A37. Because "the only basis upon which [petitioners] argue[d] for liquidated damages" was for the delay in receiving back pay (*ibid.*), the courts below properly held that recovery of liquidated damages was barred.[8]

Petitioners contend (Pet. 16-18) that an intent to waive immunity from interest can be inferred from Congress's waiver of immunity from liquidated damages. They argue that, by authorizing mandatory liquidated damages in an amount equal to the amount of backpay, Congress evidenced an intent to ensure complete compensation for delay. Pet. 18 n.5. To support that argument, petitioners rely (Pet. 16-17) on *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945). There, this Court held that employees of private employers could not waive their right to recover mandatory liquidated damages under Section 216(b). 324 U.S. at 704. In so holding, the Court stated that, by requiring an award of damages equal to the amount of backpay withheld, Congress intended

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tioners were entitled to assert timely claims for liquidated damages. The question is whether they may recover interest in the guise of discretionary liquidated damages.

[8] Petitioners do not dispute the determinations by both courts below that petitioners' only basis for seeking liquidated damages was for the belated receipt of backpay. See Pet. App. A11, A37. Nor could petitioners dispute these determinations. In seeking reconsideration by the Claims Court, petitioners expressly argued that "the only reason for the award of discretionary liquidated damages against the government is to compensate plaintiffs for delay or as the equivalent of interest." *Id.* at A42.

to provide a compensatory remedy, since there could be "damages too obscure and difficult of proof for estimate other than by liquidated damages." *Id.* at 707.[9] But a waiver of immunity from interest cannot be inferred from evidence of a broad compensatory purpose.

In applying the no-interest rule, this Court has consistently rejected arguments based on evidence that Congress intended to ensure complete compensation. The Court has also made clear that awards of interest must be treated differently from other types of recovery when recovery is sought from the federal government. In *Shaw*, the Court refused to infer an intent to allow interest on attorney's fees from a provision in Title VII authorizing "reasonable" attorney's fees. 478 U.S. at 320-321. The Court in *Shaw* found "no basis for reading the term 'reasonable' as the embodiment of a specific congressional choice to include interest as a component of attorney's fees." *Id.* at 320. In other cases, the Court has similarly refused to find that Congress waived immunity from interest by authorizing recovery of "just com-

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[9] When *Brooklyn Savings Bank* was decided, only mandatory liquidated damages were available under the FLSA, and only private employers were subject to the Act. The provision authorizing discretionary awards, now codified at 29 U.S.C. 260, was enacted as part of the Portal-to-Portal Act of 1947, ch. 52, § 11, 61 Stat. 89. The FLSA was extended to federal employers by the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55. Thus, the decision in *Brooklyn Savings Bank* stands only for the principle that Congress intended employees of private employers to be compensated fully through recovery of mandatory liquidated damages. As discussed in the text, *infra*, that principle cannot be relied upon to overcome the force of the federal no-interest rule.

pensation," *e.g.*, *United States* v. *Tillamooks*, 341 U.S. 48, 49 (1951), or the "amount equitably due," *Tillson* v. *United States*, 100 U.S. 43, 45, 47 (1879). These decisions fully support the court of appeals' conclusion in this case that no intent to waive immunity from interest can be inferred from the congressional authorization for recovery of "liquidated damages."

Petitioners' reliance on decisions that involve private employers, such as *Brooklyn Savings Bank*, *supra*, is misplaced. The statute at issue in *Shaw* directed that the United States' liability for costs, including attorney's fees, should be "the same as a private person['s]," 42 U.S.C. 2000e-5(k). See 478 U.S. at 313. The court of appeals in *Shaw* had upheld recovery from the United States of interest on an award of attorney's fees, relying on the fact that interest could be recovered from private parties. *Id.* at 313-314. In reversing the court of appeals' decision, this Court observed that "[t]he purpose of the [no-interest] rule is to permit the Government to 'occupy an apparently favored position.'" *Id.* at 315-316 (quoting *United States* v. *Verdier*, 164 U.S. 213, 219 (1896)). The Court in *Shaw* accordingly concluded that the statutory language equating the liability of the United States to that of a private party "waives the Government's immunity from attorney's fees, but not interest." 478 U.S. at 319.[10]

In sum, petitioners err in relying on evidence of the broad compensatory purposes underlying the manda-

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[10] Petitioners' reliance (Pet. 19-21) on legislative history is misplaced. Here, as in *Shaw*, neither the statute nor the legislative history contains any reference to interest. See Pet. App. A42-A43; cf. *Shaw*, 478 U.S. at 319-320.

tory liquidated damages provision in Section 216(b). That evidence cannot substitute for the express waiver of immunity from interest required under the no-interest rule. Because Section 260 does not expressly authorize a discretionary award of interest, the court of appeals correctly concluded that the no-interest rule bars recovery.

3. The court of appeals' decision does not conflict with that of any other court of appeals. Petitioners' contrary contention (Pet. 19-23) is based on their misstatement of the court of appeals' holding in this case.

The court of appeals held that the Claims Court's discretion to award "liquidated damages" under 29 U.S.C. 260 "does not extend to a liquidated damages award for interest or delay damages against the United States." Pet. App. A9. The court's holding does not totally bar recovery of liquidated damages by federal employees, as petitioners assert (Pet. 12). For one thing, the holding concerns only discretionary awards of liquidated damages under Section 260, not mandatory awards under Section 216(b). Moreover, the decision does not affect claims for discretionary awards, except to the extent such claims seek interest. Pet. App. A11. Thus, nothing in the decision forecloses discretionary awards for other types of damages that can be directly traced to statutory violations.[11]

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[11] It appears that the scope of damages that can be recovered under Section 260 is an issue that has not been widely litigated. With the exception of the district court decisions in *Jones* and *Lanehart*, we are not aware of any decisions involving awards under Section 260 against public employers. Nonetheless, we agree with the Claims Court's statement in this case that discretionary awards under Section 260 may be justified for "other reasons" than to com-

The decisions that petitioners cite (Pet. 22) do not conflict with the decision here, because they concern mandatory imposition of double damages under Section 216(b), not discretionary awards under Section 260. Thus, none of those decisions addresses the issue here: whether a court may exercise its discretion under Section 260 to allow recovery of interest from a public employer.[12] In *Thompson* v. *Sawyer*, 678 F.2d 257, 267, 282 (D.C. Cir. 1982); *Pearce* v. *Wichita County*, 590 F.2d 128, 134 (5th Cir. 1979), and *Morgado* v. *Birmingham-Jefferson County Civil Defense Corps*, 706 F.2d 1184, 1187-1189 (11th Cir. 1983), cert. denied, 464 U.S. 1045 (1984), the courts of appeals upheld awards of mandatory liquidated damages against government employers under Section 216(b); in each case, the award was based on the district court's determination that the employer failed to demonstrate under Section 260 that its actions in violation of the relevant statute were in good faith and had a reasonable basis.[13] In *Joiner* v. *City*

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pensate employees for the loss of the investment use of backpay. See Pet. App. A37. Cf. *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 153-154 (1956) (describing types of losses that government could recover under "liquidated damages" provision).

[12] The only decision that petitioners cite involving a federal employer is *Thompson* v. *Sawyer*, 678 F.2d 257 (D.C. Cir. 1982). Pursuant to the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, Tit. I, § 127(a), 96 Stat. 37, the Federal Circuit now has exclusive jurisdiction over compensation disputes involving federal employees brought in district courts pursuant to 28 U.S.C. 1346(a)(2). See 28 U.S.C. 1295(a)(2).

[13] The court in *Thompson* indicated in dicta that under Section 260 a court may award discretionary liquidated damages against a public employer, but the court did not address

of Macon, 814 F.2d 1537, 1539 (11th Cir. 1987), the district court failed to determine whether the government employer had a good faith and reasonable belief that its conduct did not violate the relevant statute, and based on that failure the court of appeals reversed the district court's refusal to award mandatory liquidated damages. In *EEOC* v. *City of Detroit Health Dep't*, 920 F.2d 355, 357-358 (6th Cir. 1990), the court of appeals reversed the district court's determination that the government employer had acted in good faith and on reasonable grounds, because that determination conflicted with the jury's finding that the statutory violation was willful. In light of the jury's finding, the court of appeals in *City of Detroit Dep't* held that a mandatory award was required. *Id.* at 358. Finally, in *Blanton* v. *City of Murfreesboro*, 856 F.2d 731, 737 (6th Cir. 1988), the court of appeals reversed an award of mandatory liquidated damages under Section 216(b) because the lower court applied the wrong legal standard in making the award.

Because the decisions on which petitioners rely involve mandatory awards of liquidated damages in an amount prescribed by statute, they are inapposite. Petitioners fail to establish a conflict among the circuits with respect to the question presented here.

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whether such an award could take the form of interest. 678 F.2d at 282.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 91-295

IN THE

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October Term, 1991

CHARLES M. DOYLE, ET AL.,

Petitioners,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 8

TABLE OF AUTHORITIES

Page

Cases:

Air Courier Conference of America v. American Postal Workers Union, 111 S.Ct. 913 (1991) 2

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 4

Beebe v. United States, 640 F.2d 1283 (Ct. Cl. 1981) 5

Cook v. United States, 885 F.2d 848 (Fed. Cir. 1988) 5

Daniels v. United States, 407 F.2d 1345 (Ct. Cl. 1969) 5

Dybach v. State of Florida Department of Corrections, 120 LC ¶ 35, 547 (11th Cir. Sept. 30, 1991) 7

Library of Congress v. Shaw, 478 U.S. 310 (1986) 6-8

Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 111 S.Ct. 905 (1991) 7

Stevens v. Department of the Treasury, 111 S.Ct. 1562 (1991) 7

Vance v. Terrazas, 444 U.S. 252 (1980) 7

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) 2

Federal Statutes:

29 U.S.C. § 216(b) 8

29 U.S.C. § 260 7

50 U.S.C. app. § 525 3

Miscellaneous:

2A Moore's Federal Practice ¶ 8.27[3][4] 2

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONERS

ARGUMENT

1. The United States contends "that in its present posture this case is not suitable for review by this Court". (Opp. 7).[1] It argues that the courts below

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[1] Defendant's Brief In Opposition to the petition for writ of certiorari is designated herein as "Opp. ___". The petition is designated as "Pet. ___". The appendix to the petition for writ of certiorari is designated as "A___". The supplemental appendix reprinted as part of this reply brief is designated as "SA__".

"did not resolve" the doubt "as to whether any of petitioners' claims were timely". (Opp. 7).

Respondent's assertion is legally incorrect and patently untrue. First, the United States did not raise this issue either before the Claims Court or the court of appeals. *Cf. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-33 (1971); see 2A Moore's Federal Practice ¶ 8.27[3][4] and cases cited therein. Respondent certainly is barred from raising it for the first time at this juncture. *Air Courier Conference of America v. American Postal Workers Union*, 111 S.Ct. 913, 917 (1991).

Second, petitioners' claims for liquidated damages were resolved properly in accordance with rules of the Claims Court on the basis of cross-motions for summary judgment. (A15, 19).[2] Before the Claims

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[2] Rule 56(f) of the Rules of the United States Claims Court states:

> **Rule 56. Summary Judgment. . . .**
>
> **(f) Form of Affidavits; Further Testimony; Defense Required.** *See* Appendix H ¶ 1. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof

(continued...)

Court, petitioners presented the declarations of Michael DeJesus, Stephen P. Jenkens, Jackie P. Stafford, and George E. Stanley that they served on active duty in the Armed Forces of the United States for varying periods of time before they joined the action as plaintiffs sufficient to bring their claims within the limitations period. (SA1-4). Petitioners argued that those firefighters' claims were timely because the two-year limitations period must be tolled for the period of their active duty military service. See Soldiers' and Sailors' Civil Relief Act, *as amended*, 50 U.S.C. app. § 525. The United States did not offer any declarations, affidavits, or documentary evidence to refute petitioners' sworn declarations. As the Claims Court held in resolving the cross-motions for summary judgment: "The present facts are not in dispute. The

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[2](...continued)
referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. (emphasis supplied).

outcome of the case, therefore, turns on whether one or the other party is entitled to judgment as a matter of law." (A19). It is settled law that summary judgment is appropriate when there are no genuine issues of material fact in dispute as alleged by the moving party which are supported by unrebutted declarations, affidavits or documentary evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); RUSCC 56(c).[3]

Third, petitioners also demonstrated to the Claims Court that many other claims were timely despite the two-year statute of limitations. Plaintiffs produced documents which established that a number of federal agencies did not begin to pay the proper amount of overtime pay to firefighters and law enforcement officers until months or even years after OPM's instructions on September 23, 1983. (SA12-13, 14, 16, 18). In support of its summary judgment motion, as an example, petitioners produced

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[3] Moreover, in response to petitioners' declarations of active military duty, respondent specifically informed the Claims Court that it would "not address their individual claims of legal 'disability'" on the cross-motions for summary judgment. Instead, respondent "respectfully request[ed] the Court to reserve that issue, pending a decision on the other issues of entitlement and equitable tolling" (Defendant's Reply to Plaintiffs' Opposition to Defendant's Cross-Motion for Summary Judgment, p. 20 fn. 13, SA5-6). It ill behooves respondent now to argue that this case may not be reviewed by this Court because the Claims Court made "no findings" on which of petitioners' claims fell into those groups. (Opp. 7).

documentary evidence that plaintiffs Thomas W. Vogt and Donald L. Sova were not paid the proper amount of overtime pay for those pay periods which fell between September 22, 1983 and July 24, 1984. Such evidence was produced by federal agencies which employed those petitioners in response to requests for discovery. Inasmuch as it was undisputed that both petitioners filed their claims for liquidated damages on November 14, 1985, most of their "continuing claims" accrued less than two years before they had filed in a timely fashion in the Claims Court.[4] Petitioners specifically included in their First Amended Motion for Summary Judgment their claim that the limitations period be tolled for the four plaintiffs who had served on active military duty and that the court apply the "continuing claims" doctrine to those plaintiffs who filed within 2 years from any pay period in which defendant failed to pay them proper overtime pay. (SA9, ¶ 6-7). None of this evidence was refuted by the United States either in its opposition to plaintiffs' motion for summary judgment or in its cross-motion for summary judgment. On appeal, petitioners specifically referred to this evidence in their brief to the court of appeals and reproduced it in the appendix to their brief, again without rebuttal or refutation by the United States. (SA20-21).

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[4] The Court of Appeals recognized that where the employer fails to make proper overtime payments on time, a cause of action accrues with each deficient paycheck which are termed "continuing claims". (A30-31); *Cook v. United States*, 885 F.2d 848, 851 (Fed. Cir. 1988); *Daniels v. United States*, 407 F.2d 1345, 1346 n. 1 (Ct. Cl. 1969); *Beebe v. United States*, 640 F.2d 1283, 1293 (Ct. Cl. 1981).

Finally, contrary to respondent's assertion, the courts below did conclude that there were in fact timely claims. The Claims Court noted in its opinion that those plaintiffs who had "continuing claims" for overtime back pay, and those whose claims were tolled while serving on active military duty, were not barred by the statute of limitations. (A30-31). The court held: "It is only this defined group of claims, and those defined in section E below [Soldiers' and Sailors' Civil Relief Act claims], that are not barred by the statute of limitations and to which the liquidated damages section discussed below would apply." (A31). In Section E of its opinion, the Claims Court found that "[f]or plaintiffs who served on active military duty," the statute of limitations was tolled during the period of time served in the military on or after September 22, 1983. *Id.*

The court of appeals on *de novo* review affirmed the Claims Court's determination that there were no material factual disputes. (A11). As to the failure of other agencies to pay the appropriate amount of overtime payments when they were earned, it found that "[e]ven after issuance of the OPM directive in September 1983, the Government apparently did not immediately begin making overtime payments." (A6). The court of appeals went on to hold that the two-year limitations period "renders *most* of the claims in this case untimely." (A7). (emphasis supplied). The court of appeals noted the undisputed evidence produced by petitioners with respect to the continuing claims of plaintiffs. (A8). It then affirmed the Claims Court on the basis of *Library of Congress v. Shaw*, 478 U.S. 310 (1986). Thus, both courts below considered the timeliness issue and found that there were

petitioners whose claims were timely. The case is suitable for review by this Court in its present posture. See *Stevens v. Department of the Treasury*, 111 S.Ct. 1562, 1567 (1991).

2. Contrary to respondent's assertion in footnote 4 of its Opposition (Opp. 7), the issue of mandatory liquidated damages under section 216(b) is fairly subsumed within the question set forth in the petition. Rule 14, Supreme Court Rules. The issues are entwined because the courts below had to dispose of the mandatory damages issue before ruling on the availability of discretionary damages. The circuit court enigmatically applied the government's pre-September 1983 "good faith" to the post-September 1983 claims (A6) without considering whether the agencies "had reasonable grounds" for failing to make those payments. 29 U.S.C. § 260. The Claims Court made the same error. (A32). See *Dybach v. State of Florida Department of Corrections*, 120 LC ¶ 35, 547 (11th Cir. Sept. 30, 1991). At footnote 3 of the petition, petitioners plainly identify the error of the court below in denying mandatory liquidated damages. Pet. 10-11, fn. 3. The Court has the authority to review this issue. See *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 111 S.Ct. 905, 911 (1991); *Vance v. Terrazas*, 444 U.S. 252, 258-59 n. 5 (1980).

3. The Government suggests that liquidated damages may be awarded in FLSA cases for reasons other than as compensation for delay or lost interest. Therefore, it argues, the court of appeals was correct in distinguishing those liquidated damages which are sought for delay or interest which are prohibited by *Library of Congress v. Shaw*, *Id.*, from permissible

liquidated damages which were waived by Congress in § 216(b).

But, neither the court of appeals, the Claims Court, nor respondent could identify any reason other than interest or delay for the award of discretionary liquidated damages in the context of FLSA cases.

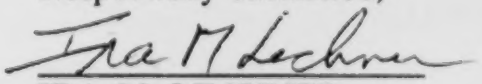
Indeed, the Claims Court held: "There may well be other reasons but this court is of the opinion that the most practicable reason for which plaintiffs might be awarded liquidated damages is to make up for the delay in receiving their back pay". (A37).

Petitioners' respectfully urge that if Congress explicitly waived the Government's sovereign immunity to suits for "liquidated damages" under § 216(b), and the only practicable reason for such damages is as compensation for delay, then the rationale of *Shaw* cannot bar petitioners' recovery.

CONCLUSION

For the reasons stated above and in the petition, a writ of certiorari should be granted.

Respectfully submitted,



IRA M. LECHNER
1015 18th Street, N.W.
Suite 801
Washington, D.C. 20036
(202) 659-4656

December 6, 1991 *Counsel of Record*

SUPPLEMENTAL APPENDIX

TABLE OF CONTENTS

Page

SUPPLEMENTAL APPENDIX A
Declaration of Michael DeJesus, Stephen P. Jenkens, Jackie P. Stafford, and George E. Stanley appended to plaintiffs' motion for summary judgment SA1

SUPPLEMENTAL APPENDIX B
Defendant's Reply to Plaintiffs' Opposition to Defendant's Cross-Motion For Summary Judgment, p. 20 fn. 13 . . . . . SA5

SUPPLEMENTAL APPENDIX C
Plaintiffs' First Amended Motion For Summary Judgment SA7

SUPPLEMENTAL APPENDIX D
Evidence appended to plaintiffs' motion for summary judgment before the Claims Court: Department of Treasury letter, March 5, 1987; Department of the Army, Memorandum, 16 December 1986, Attachment C; Internal Revenue Service Memorandum, July 2, 1987, Attachment C; United States Department of Agriculture memorandum, Oct. 23, 1987 . . . . . SA12

SUPPLEMENTAL APPENDIX E
Brief and Appendix for Plaintiffs-Appellants before the United States Court of Appeals for the Federal Circuit, p. 12-13 fn. 7 . . . . . SA21

SUPPLEMENTAL APPENDIX A

IN THE UNITED STATES CLAIMS COURT

CHARLES M. DOYLE, *et al.*, AND CONSOLIDATED CASES, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	C.A. No. 669-85C

DECLARATION OF MICHAEL DEJESUS

Pursuant to 28 U.S.C. § 1746, I MICHAEL DEJESUS hereby declare under penalty of perjury:

1. I was employed as a fire fighter with the United States Government from October 1973 to March 1982 and from March 1986 to February 1988.

2. I have served on active duty in the Armed Forces of the United States from March 1982 to March 1986 and February 1988 to present.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge and belief.

Date: 14 April 89

Michael DeJesus

IN THE UNITED STATES CLAIMS COURT

CHARLES M. DOYLE, *et al.*, AND CONSOLIDATED CASES, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	C.A. No. 669-85C

DECLARATION OF STEPHEN P. JENKENS

Pursuant to 28 U.S.C. § 1746, I STEPHEN P. JENKENS hereby declare under penalty of perjury:

1. I was employed as a fire fighter with the United States Government from September 1975 to September 1982.

2. I have served on active duty in the Armed Forces of the United States from November 1, 198? to present.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge and belief.

Date: 14 April 89

Stephen P. Jenkens

IN THE UNITED STATES CLAIMS COURT

CHARLES M. DOYLE, *et al.*, AND CONSOLIDATED CASES, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	C.A. No. 669-85C

DECLARATION OF JACKIE P. STAFFORD

Pursuant to 28 U.S.C. § 1746, I JACKIE P. STAFFORD hereby declare under penalty of perjury:

1. I was employed as a fire fighter with the United States Government from January, 1979 to October, 1983.

2. I have served on active duty in the Armed Forces of the United States from October 3, 1983 to the present.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge and belief.

Date: 14 April 89

Jackie P. Stafford

IN THE UNITED STATES CLAIMS COURT

CHARLES M. DOYLE, *et al.*, AND CONSOLIDATED CASES, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	C.A. No. 669-85C

DECLARATION OF GEORGE E. STANLEY

Pursuant to 28 U.S.C. § 1746, I GEORGE E. STANLEY hereby declare under penalty of perjury:

1. I was employed as a fire fighter with the United States Government from January, 1979 to March 1981.

2. I have served on active duty in the Armed Forces of the United States from March, 1981 to April, 1986.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge and belief.

Date: April 13, 1989

George E. Stanley

SUPPLEMENTAL APPENDIX B

IN THE UNITED STATES CLAIMS COURT

CHARLES M. DOYLE, *et al.*, Plaintiffs,	)	
v.	)	C.A. No. 669-85C
UNITED STATES OF AMERICA, Defendant.	)	

DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

* * * * * *

Plaintiffs have demonstrated no disability or other qualitative difference between themselves and the *Marren* plaintiffs, and should not, therefore, be permitted to hide behind their own ignorance or laxity and contend that exercise of their substantive rights was

in some manner derived from the issuance of a discovery order in *Cook I*.[13]

---

[13] Plaintiffs have produced the names of certain individuals whose claims were allegedly tolled during military service. To the extent that those plaintiffs would fall within the coverage of the Soldiers and Sailors Relief Act, 50 U.S.C. § 525, their claims present a different issue for resolution than the thousands of other plaintiffs in this case. We do not address their individual claims of legal "disability" here, and respectfully request the Court to reserve that issue, pending a decision on the other issues of entitlement and equitable tolling.

SUPPLEMENTAL APPENDIX C

IN THE UNITED STATES CLAIMS COURT

CHARLES M. DOYLE, *et al.*, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	C.A. No. 669-85C

PLAINTIFFS' FIRST AMENDED MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by counsel, respectfully move the Court as follows:

1. To order summary judgment in favor of persons who are plaintiffs in this cause;

2. To order that such plaintiffs shall recover of the defendant, the United States of America, liquidated damages to be determined according to the following formula:

> For overtime worked in calendar years 1978 to and including 1986, liquidated damages equal to 100 percent (100%) of the FLSA back pay previously paid for those years to such plaintiffs by defendant

pursuant to FPM Letter 551-20, dated September 22, 1983.

Defendant shall pay an additional 1.3 percent (1.3%) of back pay which previously was deducted by defendant as a Medicare contribution.[1]

3. To order that the Court toll the commencement of the running of the statute of limitations as to all plaintiffs from September 22, 1983 to the present time inasmuch as the government has not rectified its errors of omission in failing to inform employees of their rights to liquidated damages in FPM Bulletin 551-14 and in failing to post, "and keep posted", the FLSA notice in FPM Letter 551-8; **alternatively**, we requested that the commencement of the running of the limitations period be tolled from September 22, 1983 to the present time for each plaintiff who has filed a declaration that he had no actual knowledge of his right to sue the United States for liquidated damages until he was so informed less than two years before he "opted-in" as a plaintiff to this action.

4. **Alternatively**, to order that pursuant to the doctrine of *Honda v. Clark*, the commencement of the running of the statute of limitations be tolled for

---

1 This paragraph is based on an Order entered by Judge Gasch in *Jones II* to which the Government raised no objection.

all plaintiffs until *Harnedy et al. v. United States* is concluded, or until October 31, 1986, the date that *Jones* was dismissed.

5. Alternatively, to order that as to any plaintiff who opted-in to this case after his or her name and address was produced by defendant, the running of the limitations period be tolled from the date plaintiffs made their demand for production on September 17, 1985 until sixty days after the date his or her name and address actually was produced.

6. To order that the limitations period be tolled during the period of active military service performed by plaintiffs Michael DeJesus, Stephen P. Jenkens, Jackie P. Stafford, and George E. Stanley.

7. To order that pursuant to the continuing claims doctrine, summary judgement should be awarded to those plaintiffs who filed their Consent Form less than two years form any pay period which ended after September 22, 1983, and in which defendant failed to pay the proper overtime pay.

8. To order summary judgment in favor of those plaintiffs whose Consent Forms were filed in this Court within two years of the date they were paid overtime backpay in compliance with FPM Bulletin 551-14.

9. To order that this action be continued pending the filing of the consent forms of additional plaintiffs within the statute of limitations and that a judgment for liquidated damages be ordered as to those additional plaintiffs on the same terms as the

judgement order which is applicable to the current plaintiffs.

10. To order that defendant be directed forthwith to compute and pay the amount of liquidated damages to which each individual firefighter or law enforcement officer is entitled; and that upon computation and payment of such amount, such plaintiff be given a worksheet showing the basis of the computation.

11. To order that at each installation, plaintiffs' counsel may designate a representative to examine on his behalf the computations and to forward a copy thereof to plaintiffs' counsel in any case in which there is a dispute.

12. To order that the aforesaid computation and payment be without prejudice to an individual plaintiff's opportunity to appeal administratively, and ultimately to the Court, any disagreement he or she may have with the amount specified.

13. To order the payment of reasonable attorney's fees if counsel for the parties cannot agree on an appropriate amount.

Respectfully submitted,

Ira M. Lechner
1899 L Street, NW
Suite 1250
Washington, DC 20036
(202) 659-4656

Counsel to Plaintiffs

DATED: September 29, 1989

SUPPLEMENTAL APPENDIX D

DEPARTMENT OF THE TREASURY
Washington

March 5, 1987

Dear Mr. Cohen:

This letter transmits information requested by your letter of October 6, 1986 in the matter of Charles M. Doyle, Jr., et al. v. United States, cl. ct. No. 660-85C.

The responding Treasury organizations are the Bureau of Alcohol, Tobacco and Firearms, the U.S. Customs Service, and the U.S. Secret Service. The Internal Revenue Service is responding directly to your office.

All organizations represented in the enclosed listings had difficulty in locating and extracting FLSA back overtime pay data from old pay records in the detail requested in your October 6 letter. Except for the uniformed Division of the Secret Service, which issued special earnings statements for a one-time retroactive payout in regular salary checks dated July 30, 1984, the active payout in regular salary checks dated July 30, 1984, the responding activities did not provide breakouts of amounts due for each pay period covered by the span of retroactivity. They did, however, provide information for each covered employee showing the total amount of FLSA back overtime pay, and the pay periods in which such payments were made.

We hope this information on total back pay will meet your needs. Retrieval of additional information to reflect earned overtime amounts by pay period for each covered employee during the entire period of retroactivity would require an extensive manual search of original hard copy documentation, and would place a heavy burden on the resources of the affected activities.

The experience of one responding bureau illustrates the potential workload associated with the gathering of retroactive earnings data by pay period. During the period of late 1984 through early 1986, the Customs Service paid out $2,178,170.34 to 1,314 individual Customs Officers as the result of 17,440 pay actions. In turn, each of these pay actions represents the cumulative total of several pay periods of overtime earnings extending back, in some cases, to 1978.

With respect to the information requested in Attachment C of your October 6 letter, no specific dates could be identified for the mailings of the overtime back pay paychecks. However, since the back pay was included in paychecks for regular pay periods in all cases, mailings or electronic transfers may be assumed to have preceded by two or three days the pay days for the pay periods shown. Further, no dates could be established for the actual receipt of back pay by the first or last employee involved in this matter.

Responding activities began paying correct FLSA overtime in accordance with FPM Bulletin No. 551-14 at different times, as follows:

Alcohol, Tobacco and Firearms		01-01-84
Customs Service		09-16-83
Secret Service	(Uniformed Div.)	07-30-84
	(All Others)	Nov/Dec 1984

Finally, the enclosed materials pertain to law enforcement personnel only. The Department of the Treasury does not employ firefighters. We have no information as to which, if any, of our current or former employees were involved in cases Jones v. Donovan and Lanehart v. Marshall.

If additional information is required, please contact William F. Casey, Assistant Director of Personnel (Classification, Pay and Program Evaluation). Mr. Casey's telephone number is 535-9445.

Sincerely,

Charlene J. Robinson
Acting Director of Personnel

Mr. David M. Cohen
Director, Commercial Litigation Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530

Enclosure

SA15

DEPARTMENT OF THE ARMY
SENECA ARMY DEPOT
ROMULUS, NEW YORK 14541-5001

16 December 1986

SUBJECT: Backpay for Law Enforcement and Fire Protection Personnel

* * * * * *

Attachment C

Date Overtime Backpay Paychecks Were Mailed By Your Agency	July 11, 1984
Date First Firefighter Or Law Enforcement Employee Received Overtime Backpay Paycheck	July 13, 1984
Date Last Firefighter Or Law Enforcement Employee Received Overtime Backpay Paycheck	July 13, 1984
Date Firefighters and Law Enforcement Employees Began Receiving Correct Overtime	July 27, 1984

INTERNAL REVENUE SERVICE
MEMORANDUM

DATE: Jul 2, 1987

SUBJECT: Charles M. Doyle, Jr. et al. v. United States, Cl. Ct. No. 660-85C

* * * * * *

Attachment C

Date Overtime Backpay Paychecks Were Mailed By Your Agency	All monies paid as Overtime Back Pay was included with employees' regular salary payment received on October 20, 1986 (Pay date for Pay Period 22-86). Those employees who had separated were issued individual checks dated October 20, 1986.
Date First Firefighter Or Law Enforcement Employee Received Overtime Backpay Paycheck	October 20, 1986

Date Last Firefighter Or Law Enforcement Employee Received Overtime Backpay Paycheck	138 IRS employees (Attachment B) were paid back pay October 20, 1986. It is anticipated that approximately 60 additional employees will be entitled to Overtime Backpay. Currently, historical payroll data is being accumulated and reviewed for subsequent pay calculation. Anticipated date of payment for these employees - September, 1987. (See *NOTE, below).
Date Firefighters and Law Enforcement Employees Began Receiving Correct Overtime	Pay Period 05, 1985, beginning, February 17, 1985

*NOTE: All requested information, as provided in Attachment B, will be provided for these employees following completion of documentation review and pay calculation.

UNITED STATES DEPARTMENT OF AGRICULTURE
Agriculture Research Service
Personnel Division
Beltsville, Maryland 20705

Oct. 23, 1987

SUBJECT: Charles M. Doyle, Jr. et al. v. United States, C.I. No. 660-85C

* * * * * *

Attachment C

Date Overtime Backpay Paychecks Were Mailed By Your Agency	Checks were mailed directly by the Department of Treasury to employee. Identified on the attached is the date Treasury was authorized to make payment.
Date First Firefighter Or Law Enforcement Employee Received Overtime Backpay Paycheck	Unknown - see above
Date Last Firefighter Or Law Enforcement Employee Received Overtime Backpay Paycheck	Unknown - see above

Date Firefighters and Law Enforcement Employees Began Receiving Correct Overtime	03-18-85

SUPPLEMENTAL APPENDIX E

BRIEF AND APPENDIX FOR PLAINTIFFS-APPELLANTS

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-5148

CHARLES M. DOYLE and 4,428 OTHER NAMED PLAINTIFFS,

Plaintiffs-Appellants,

- v. -

THE UNITED STATES,

Defendant-Appellee.

---

* * * * * *

In resisting the government's cross-motion for summary judgment, appellants produced documentary evidence demonstrating that some of the plaintiffs were not paid

the proper amount of overtime for pay periods which ended after September 22, 1983 (A50, 52, 55, 57).[7]

---

[7] In the damages phase of this bifurcated litigation, each plaintiff's pay records must be examined. For example, plaintiffs Thomas W. Vogt (social security no. 116-48-4603) (A49) and Donald L. Sova (social security no. 067-44-7465) (A48) did not receive the correct amount of overtime pay in accordance with FPM Letter 551-20 until the pay period beginning July 27, 1984. Both plaintiffs-appellants filed their claim for liquidated damages in this case on November 14, 1985, less than two years after each of the pay periods which ended between November 14, 1983 and July 27, 1984. Under 29 U.S.C. § 216(b), they are entitled to 100% mandatory liquidated damages for each of those pay periods equal to the amount of additional overtime pay to which they were entitled by virtue of the new policy announced in FPM Letter 551-20.

As the letter to the Department of Justice from Charlene J. Robinson, Acting Director of Personnel of the Treasury Department (A51-52) demonstrates, these are not isolated instances inasmuch as the Bureau of Alcohol, Tobacco and Firearms did not begin paying the correct FLSA overtime until January 1, 1984; the Uniformed Division of the Secret Service did not begin to pay correctly until July 30, 1984; the non-uniformed division of Secret Service did not begin to pay correctly until November/December, 1984. The letter also inexplicably states that the Customs Service did not

(continued...)

While the United States established its "good faith" for the period between January 1, 1978 and September 22, 1983, there was no conceivable legal excuse for failing to pay the proper amount of overtime after September 22, 1983. And, none was offered in the Claims Court below.

* * * * * *

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[7](...continued)
begin paying correct overtime until September 16, 1983 in accordance with FPM Bulletin 551-14, but it was not issued until October 27, 1983 (A37) (presumably the Treasury Department meant that overtime pay was paid correctly beginning on September 16, 1984, not 1983). Appropriate discovery should clarify this date on remand.